

# THE LAW OF NATIONS

AN INTRODUCTION TO THE  
INTERNATIONAL LAW OF PEACE

BY  
J. L. BRIERLY

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## PREFACE TO FOURTH EDITION

THE third edition of this book was published in 1942, but owing to the difficulties of war-time publishing it was little more than a reprint of the second edition of 1936. Much has happened in the field of international law since that date, and the present edition contains much new matter. But the purpose of the book remains what it was when it was first published in 1928. It is not intended as a substitute for the standard text-books on the subject, but as an introduction either for students who are beginning their law courses, or, I hope, for laymen who wish to form some idea of the part that law plays, or that we may reasonably hope that it will play, in the relations of states. That question has never been more important than it is to-day, but it is one that cannot be answered by *a priori* methods. Such methods lead too often either to an underestimation of the services that, even as things are, international law is rendering to the world, or to an equally mistaken assumption that it offers us the key to all our international troubles. The truth is that it is neither a myth on the one hand, nor a panacea on the other, but just one institution among others which we can use for the building of a saner international order.

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J. L. B.



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# I

## THE ORIGINS OF INTERNATIONAL LAW

### § 1. *The Rise of Modern States*

THE Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another. Rules which may be described as rules of international law are to be found in the history both of the ancient and medieval worlds; for ever since men began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations. But as a definite branch of jurisprudence the system which we now know as international law is modern, dating only from the sixteenth and seventeenth centuries, for its special character has been determined by that of the modern European state system, which was itself shaped in the ferment of the Renaissance and the Reformation. Some understanding of the main features of this modern state system is therefore necessary to an understanding of the nature of international law.

For the present purpose what most distinguishes the modern post-Reformation from the medieval state is the enormously greater strength and concentration of the powers of government in the former.



The national and territorial state with which we are familiar to-day in western Europe, and in countries which are founded on, or have adopted, western European civilization, is provided with institutions of government which normally enable it to enforce its control at all times and in all parts of its dominions. This type of state, however, is the product of a long and chequered history; and throughout the Middle Ages the growth of strong centralized governments was impeded by many obstacles, of which difficulties of communication, sparsity of population, primitive economic conditions, are obvious illustrations.\* But two of these retarding influences deserve special notice because of the imprint which they have left even to this day on the modern state.

The first of these was feudalism. Modern historical research has taught us that, while it is a mistake to speak of a feudal *system*, the word 'feudalism' is a convenient way of referring to certain fundamental similarities which, in spite of large local variations, can be discerned in the social development of all the peoples of western Europe from about the ninth to the thirteenth centuries. Bishop Stubbs, speaking of feudalism in the form it had reached at the Norman Conquest, says:

'It may be described as a complete organization of society through the medium of land tenure, in which from the king down to the lowest landowner all are bound together by obligation of service and defence: the lord to protect his vassal, the vassal to do service to his lord; the defence and service being based on and regulated by

the nature and extent of the land held by the one of the other. In those states which have reached the territorial stage of development, the rights of defence and service are supplemented by the right of jurisdiction. The lord judges as well as defends his vassal; the vassal does suit as well as service to his lord. In states in which feudal government has reached its utmost growth, the political, financial, judicial, every branch of public administration is regulated by the same conditions. The central authority is a mere shadow of a name.<sup>1</sup>

Thus to speak of a feudal 'state' is almost a misuse of terms; in a sense the feudal organization of society was a substitute for its organization in a state, and a perfectly feudal condition of society would be not merely a weak state, but the negation of the state, altogether. Such a condition was never completely realized at any time or anywhere; but it is obvious that the tendency of feudalism to disperse among different classes those powers which in modern times we regard as normally concentrated in the state, or at any rate as under the state's ultimate control, had to pass away before states in our sense could come into existence.

On the other hand there were elements in the feudal conception of society capable of being pressed into the service of the unified national states which were steadily being consolidated in western Europe from about the twelfth to the sixteenth centuries, and influential in determining the form that those states would take. Thus when its disintegrating

<sup>1</sup> *Constitutional History of England*, vol. i, p. 274.

effects on government had been eliminated, the duty of personal loyalty of vassal to lord which feudalism had made so prominent was capable of being transmuted into the duty of allegiance of subject to monarch in the national state; the intimate association of this personal relation with the tenure of land made the transition to *territorial* monarchy easy and natural; and the identification with rights of property of rights which we regard as properly political led to notions of the absolute character of government, of the realm as the 'dominion' or property of the monarch, and of the people as his 'subjects' rather than as citizens. Feudalism itself had been an obstacle to the growth of the national state, but it left to its victorious rival a legacy of ideas which emphasized the absolute character of government.

The other influence which retarded the growth of states in the Middle Ages was the Church. It is not necessary here to speak of the long struggle between Pope and Emperor, although one incidental effect of this was to assist the growth of national states by breaking up the unity of Christendom. More significant in the present context is the fact that never until after the Reformation was the civil authority in any country regarded as supreme. Always governmental authority was divided; the Church claimed and received the obedience of the subjects of the state, and its claims were not always limited to the purely spiritual sphere. Even in England, always somewhat restive under papal interference, the idea of the omni-competence of the

civil power would have been unthinkable. Men might dispute exactly how far the powers of each of the rival authorities extended; but that there were limits to the powers of the state, that the Church had *some* powers over the members of the state which it neither derived from, nor held by the sufferance of, the state, was certain. States might often act as arbitrarily as any absolute state of the post-Reformation world; they might struggle against this or that claim of the Church; but neither in theory nor in fact were they absolute. But just as the state was gradually consolidating its power against the fissiparous tendencies of feudalism within, so it was more and more resisting the division of authority imposed upon it by the Church from without; and this latter process culminated in the Reformation, which in one of its most important aspects was a rebellion of the states against the Church. It declared the determination of the civil authority to be supreme in its own territory; and it resulted in the decisive defeat of the last rival to the emerging unified national state. Over about half of western Europe the rebellion was completely and evidently successful; and even in those countries which rejected Protestantism as a religion, the Church was so shaken that as a political force it could no longer compete with the state. The Peace of Westphalia, which brought to an end in 1648 the great Thirty Years War of religion, marked the acceptance of the new political order in Europe.

This new order of things gave the death-blow to

the lingering notion that Christendom, in spite of all its quarrels, was in some sense still a unity, and there was a danger that the relations between states would be not only uncontrolled in fact, as they had often been before, but henceforth uninspired even by any unifying ideal. The modern state, in contrast with the medieval, seemed likely to become the final goal of unity, and Machiavelli's *Prince*, written in 1513, though it formulated no theory of politics, had already given to the world a relentless analysis of the art of government based on the conception of the state as an entity entirely self-sufficing and non-moral. Fortunately, however, at the very time when political development seemed to be leading to the complete separateness and irresponsibility of every state, other causes were at work which were to make it impossible for the world to accept the absence of bonds between state and state, and to bring them into more intimate and constant relations with one another than in the days when their theoretical unity was accepted everywhere.<sup>1</sup> Among these causes may be mentioned (1) the impetus to commerce and adventure caused by the discovery of America and the new route to the Indies; (2) the common intellectual background created by the Renaissance; (3) the sympathy felt by co-religionists in different states for one another, from which arose a loyalty transcending the boundaries of states; and (4) the common feeling of revulsion against war, caused by the savagery with which the wars of religion were

<sup>1</sup> Cf. Westlake, *Collected Papers*, p. 55.

waged. All these causes co-operated to make it certain that the separate state could never be accepted as the final and perfect form of human association, and that in the modern as in the medieval world it would be necessary to recognize the existence of a wider unity. The rise of international law was the recognition of this truth. It accepted the abandonment of the medieval ideal of a world-state and took instead as its fundamental postulate the existence of a number of states, secular, national, and territorial; but it denied their absolute separateness and irresponsibility, and proclaimed that they were bound to one another by the supremacy of law. Thus it reasserted the medieval conception of unity, but in a form which took account of the new political structure of Europe.

## § 2. *The Doctrine of Sovereignty*

Out of the new kind of state which developed from the Reformation there arose a new theory of the nature of states, the doctrine of sovereignty. This was first explicitly formulated in 1576 in the *De Republica* of Jean Bodin, and since sovereignty has become the central problem in the study both of the nature of the modern state and of the theory of international law, it is necessary to examine its origins and its later development with some care.

Like all works of political theory, even when they profess to be purely objective, Bodin's *Republic* was deeply influenced by the circumstances of its time and by its author's sentiments towards them; indeed one



of Bodin's merits is that he drew his conclusions from observation of political facts, and not, as writers both before and since his day have too often done, from supposedly eternal principles concerning the nature of states as such. France in Bodin's time had been rent by faction and civil war, and he was convinced that the cause of her miseries was the lack of a government strong enough to curb the subversive influences of feudal rivalries and religious intolerance, and that the best way to combat these evils was to strengthen the French monarchy. He saw, too, that a process of this kind was actually taking place in his own day throughout western Europe; unified states were emerging out of the loosely compacted states of medieval times, and the central authority was everywhere taking the form of a strong personal monarchy supreme over all rival claimants to power, secular or ecclesiastical. Bodin concluded therefore that the essence of statehood, the quality that makes an association of human beings a state, is the unity of its government; a state without a *summa potestas*, he says, would be like a ship without a keel. He defined a state as 'a multitude of families and the possessions that they have in common ruled by a supreme power and by reason' (*respublica est familiarum rerumque inter ipsas communium summa potestate ac ratione moderata multitudo*), and he dealt at length with the nature of this *summa potestas* or *majestas*, or, as we call it, sovereignty. But the idea underlying it is simple. Bodin was convinced that a confusion of uncoordinated independent authorities must be fatal to a state, and

that there must be one final source and not more than one from which its laws proceed. The essential manifestation of sovereignty (*primum ac praecipuum caput majestatis*), he thought, is the power to make the laws (*legem universis ac singulis civibus dare posse*), and since the sovereign makes the laws, he clearly cannot be bound by the laws that he makes (*majestas est summa in cives ac subditos legibusque soluta potestas*).

We might suppose from this phrase that Bodin intended his sovereign to be an irresponsible supra-legal power, and some of the language in the *Republic* does seem to support that interpretation. But that was not his real intention.<sup>1</sup> For he went on to say that the sovereign is not a *potestas legibus omnibus soluta*; there are some laws that do bind him, the divine law, the law of nature or reason, the law that is common to all nations, and also certain laws which he calls the *leges imperii*, the laws of the government. These *leges imperii*, which the sovereign does not make and cannot abrogate, are the fundamental laws of the state, and in particular they include the laws which determine in whom the sovereign power itself is to be vested and the limits within which it is to be exercised; we should call them to-day the laws of the constitution. The real meaning of Bodin's doctrine can only be understood if we remember always that the state he is describing is one in which the government is, as he calls it, a *recta* or a *legitima gubernatio*, that is to say, one in which the highest power, however strong and unified, is still neither

<sup>1</sup> See on this point McIlwain, *Constitutionalism and the Changing World*.



arbitrary nor irresponsible, but derived from, and defined by, a law which is superior to itself. In that he was following the medieval tradition of the nature of law, for in the Middle Ages men looked on law not as something wholly man-made; they believed that behind the merely positive laws of any human society there stood a fundamental law of higher binding force embodying the wisdom of the past, and that positive laws must conform to this higher law if they were to have validity. The notion that legitimate power could ever be purely arbitrary is alien to all the legal thought of the Middle Ages, and in this respect Bodin's work made no break with the past. Medieval rulers might, and no doubt often did, behave arbitrarily; but that could not alter the fact that it was still by the law that the rightfulness or otherwise of their conduct must be judged; it was law that made the ruler, not, as later theories of sovereignty have taught us to believe, the will of rulers that made the law. Where Bodin broke away from the medieval tradition of law was in making his sovereign a legislator, for legislation was a function which that tradition did not readily admit; when a medieval ruler made new law men preferred to regard it as an act of interpreting, or of restoring the true construction of, the law as it had been handed down from the past.

In the form in which Bodin propounded the doctrine of sovereignty it raised no special problem for the international lawyer. Sovereignty for him was an essential principle of internal political order, and he

would certainly have been surprised if he could have foreseen that later writers would distort it into a principle of international disorder, and use it to prove that by their very nature states are above the law. Bodin evidently did not think so, for he included in the *Republic* a discussion of those very rules for the conduct of states out of which other writers of his day were already beginning to build the new science of international law; it certainly never occurred to him that in what he was writing about sovereignty he was cutting away their foundations. Yet this is what we are told that the doctrine of sovereignty has done, and though the story is long and tangled there have been two main developments which have brought about this astonishing reversal of its original effect. One is that sovereignty came later to be identified with absolute power above the law, and the other is that what was originally an attribute of a personal ruler inside the state came to be regarded as an attribute of the state itself in its relations to other states. The causes that led to these changes lie in the history of the modern state, and the theory has followed, as it generally does, in the wake of the facts.

We have seen that Bodin intended his sovereign to be a constitutional ruler subordinate to the fundamental law of the state. But there had always been grave weaknesses in the medieval concept of the fundamental law as a defence against absolutism. There was no authentic text of this law, and no means therefore of determining whether a particular

ruler had transgressed it, and even if he had, there was usually nothing that could be done about it. But throughout the Middle Ages the power of rulers was always limited in fact, and so long as that state of things endured it was possible for men to go on believing that law did set some limitations on ruling power. In the sixteenth century, however, the barriers against absolutism were giving way, and the consolidation of strong governments with no effective checks on the powers of rulers was breaking down the medieval idea of law as a customary rule which set limits to all human authority and was making it natural to think of law as man-made, the manifestation of a ruler's superior will. The reverence everywhere paid to Roman law encouraged this tendency, for Roman law taught that the will of the prince is law. But in the main it was new political facts that were making of the ruler a supra-legal power, and accustoming men to think of the sovereign not, as Bodin had pictured him, as the ruler by law established, but as the holder of the strongest power in the state, no matter how that power might have been acquired.

This development reached its culmination in the *Leviathan* of Thomas Hobbes, which was published in 1651, and it is interesting to note that Hobbes, like Bodin, was writing with his eyes on the events of his own time; for he, too, had seen a civil war, and for him, as for Bodin, sovereignty was an essential principle of order. Hobbes believed that men need for their security a common power to keep them in

awe and to direct their actions to the common benefit,<sup>1</sup> and for him the person or body in whom this power resides, however it may have been acquired, is the sovereign. Law neither makes the sovereign, nor limits his authority; it is might that makes the sovereign, and law is merely what he commands. Moreover, since the power that is the strongest clearly cannot be limited by anything outside itself, it follows that sovereignty must be absolute and illimitable; 'it appeareth plainly that the sovereign power . . . is as great as possibly men can be imagined to make it.'<sup>2</sup> This, of course, is what in our time we call totalitarianism pure and simple.

One result of identifying sovereignty with might instead of legal right was to remove it from the sphere of jurisprudence, where it had its origin and where it properly belongs, and to import it into political science, where it has ever since been a source of confusion. So long as the sovereign is the highest *legal* authority there is usually no difficulty in identifying him. But to identify the strongest power involves us in an investigation of all those extra-legal forces, political, social, psychological, and so on, which determine how the institutions of the state shall operate in practice. That is a hopeless quest, for as a rule there is no person or body of persons in a society whose will always prevails; in fact, as has been truly said, the real rulers of society are never discoverable. Yet so strong had the hold of sovereignty upon the imaginations of political scientists

<sup>1</sup> *Leviathan*, ch. xvii.

<sup>2</sup> *Ibid.*, ch. xx.

become that when it became obvious, as it soon did, that the personal monarch no longer fitted the role, they started a hunt for the 'location' of sovereignty, almost as if sovereignty, instead of being a reflection in theory of the political facts of a particular age, were a substance which must surely be found somewhere in every state if only one looked for it carefully enough. With the coming of constitutional government Locke, and after him Rousseau, propounded the theory that the people as a whole were the sovereign, and in the eighteenth century this became the doctrine which was held to justify the American and the French Revolutions. As a fighting slogan, as a protest against arbitrary government and a demand that government should serve the interests of the governed and not only of the governors, the doctrine of popular sovereignty has had beneficent results, but as a scientific doctrine it rests on a confusion of thought. It tries to combine two contradictory ideas; that of absolute power somewhere in the state, and that of the responsibility of every actual holder of power for the use to which he puts it. It is possible to locate a sovereign in Bodin's sense in a constitutional state, though Bodin went too far in holding that the supreme power of making law must always be concentrated in a single hand; he could not foresee that the device of federation would make it possible to divide that power between different holders without producing chaos in the state.<sup>1</sup>

<sup>1</sup> Cf. *U.S. v. Lanza*, 260 U.S., where Taft C.J. speaks of 'two sovereignties, deriving power from different sources, capable of deal-

But it is not possible to locate a Hobbesian sovereign in a constitutional state, and the political philosophers failed to see that with the coming of democracy a new theory of the nature of governing power was called for. In any case the whole people cannot be the sovereign in either sense; they do not rule, for the work of government is a skilled and a full-time job which the law entrusts to particular individuals or organs, and as they are normally incapable of acting as a body, they are not even the strongest power; a politically conscious minority, a military clique, a communist party controlling the police, or a pressure group of some sort, may well be stronger than the people as a whole and better able to make its will prevail. The sovereignty of the people is not even, as soon as we begin to examine its implications more closely, a genuine democratic ideal, for the people can only act by a majority, and a majority rarely is, and never ought to be, all-powerful. No democrat if he is true to his principles can believe that there ought somewhere in the state to be a repository of absolute power, and to say that such a power resides in the people is to deny that either minorities or individuals have any rights except those that the majority allow them. That is totalitarianism, for autocracy is autocracy whoever the autocrat may be.

Still another modern development of the theory of sovereignty has been to give up the attempt to ing with the same subject matter [sc. prohibition] within the same territory'.



locate absolute power in any specific person or body within the state and to ascribe it to the state itself regarded as a juristic person. Here again we can see how changes in the doctrine of sovereignty reflect changes in political facts, for the sovereignty of the state gave expression in theory to the growing strength and exclusiveness of the sentiment of nationality during the nineteenth century. By so doing it raised a formidable difficulty for international law. For if sovereignty means absolute power, and if states are sovereign in that sense, they cannot at the same time be subject to law. International lawyers have tried to escape from the difficulty in various ways which we shall have to consider later, but if the premisses are correct there is no escape from the conclusion that international law is nothing but a delusion.

§ 3. *The Influence of the Doctrine of the Law of Nature*

Though the system of international law is modern, it had, like the modern state itself, a mediæval foundation. It was out of the conception of a law of nature that the early writers on international law developed their systems, and that foundation, as Sir Frederick Pollock says, has always and everywhere been treated as sound except by one insular and unhistorical school.<sup>1</sup> Modern legal writers, especially in England, have sometimes ridiculed the conception of a law of nature, or while recognizing its great

<sup>1</sup> *Essays in the Law*, p. 62.

historical influence they have treated it as a superstition which the modern world has rightly discarded. Such an attitude proceeds from a misunderstanding of the medieval idea; for under a terminology which has ceased to be familiar to us the phrase stands for something which no progressive system of law ever does or ever can discard. Some knowledge of what a medieval writer meant by the term is necessary if we would understand either how international law arose, or how it develops to-day.

A long and continuous history,<sup>1</sup> extending at least as far back as the political thought of the Greeks, lies behind the conception; but its influence on international law is so closely interwoven with that of Roman law that the two may here be discussed together. The early law of the primitive Roman city-state was able to develop into a law adequate to the needs of a highly civilized world empire, because it showed a peculiar capacity of expansion and adaptation which broke through the archaic formalism which originally characterized it, as it characterizes all primitive law. In brief, the process of expansion and adaptation took the form of admitting side by side with the *jus civile*, or original law peculiar to Rome, a more liberal and progressive element, the *jus gentium*, so called because it was believed or feigned to be of universal application, its principles being regarded as so simple and reasonable that they must be recognized everywhere and by every one. This practical development was

<sup>1</sup> Cf. Pollock, *Essays in the Law*, ch. ii.



reinforced towards the end of the Republican era by the philosophical conception of a *jus naturale* which, as developed by the Stoics in Greece and borrowed from them by the Romans, meant, in effect, the sum of those principles which ought to control human conduct, because founded in the very nature of man as a rational and social being. In course of time *jus gentium*, the new progressive element which the practical genius of the Romans had imported into their actual law, and *jus naturale*, the ideal law conforming to reason, came to be regarded as generally synonymous. In effect, they were the same set of rules looked at from different points of view; for rules which were everywhere observed, i.e. *jus gentium*, must surely be rules which the rational nature of man prescribes to him, i.e. *jus naturale*, and vice versa. Medieval writers later developed this conception of a law of nature, sometimes elaborating it in ways which appear to the modern mind both fanciful and tedious; but so powerful did its influence on men's minds become that the Church accepted it into the doctrinal system, and St. Thomas Aquinas, for example, taught that the law of nature was that part of the law of God which was discoverable by human reason, in contrast with the part which is directly revealed. Such an identification of natural with divine law necessarily gave the former an authority superior to that of any merely positive law of human ordinance, and some writers even held that positive law which conflicted with natural law could not claim any binding force.

The effect of such a conception as this, when applied to the theory of the relations of the new national states to one another, is obvious, for it meant that it was not in the nature of things that those relations should be merely anarchical; on the contrary they must be controlled by a higher law, not the mere creation of the will of any sovereign, but part of the order of nature to which even sovereigns were subjected. Over against the theory of sovereignty, standing for the new nationalistic separation of the states of Europe, was set the theory of a law of nature denying their irresponsibility and the finality of their independence of one another. No doubt it was impossible to point to any authentic text of this law, and different interpretations of it were possible; but the belief that, in spite of all appearance, the whole universe, and included in it the relations of sovereigns to one another, must be ruled by law, remained. Moreover, the difficulty of discovering the dictates of this law presented itself to a mediæval writer with much less force than it does to the modern mind. For he had in fact a special guide ready to his hand in Roman law.

The position of Roman law in Europe in the sixteenth century has an important bearing on the beginnings of international law. There were some countries, such as Germany, in which a 'reception' of Roman law had taken place; that is to say, it had driven out the local customary law and had been accepted as the binding law of the land. In other countries the process had not gone so far as this; but

even in these the principles of Roman law were held in great respect and were appealed to whenever no rules of local law excluded them. Everywhere in fact Roman law was regarded as the *ratio scripta*, written reason; and a medieval writer, seeking to expound the law of nature, had only to look about him to see actually operative in the world a system of law which was the common heritage of every country, revered everywhere as the supreme triumph of human reason. Moreover, this law had a further claim to respect from its close association with the Canon Law of the Church.

Thus Roman law reduced the difficulty of finding the contents of natural law almost to vanishing-point; and in fact the founders of international law turned unhesitatingly to Roman law for the rules of their system wherever the relations between ruling princes seemed to them to be analogous to those of private persons. Thus, for example, rights over territory, when governments were almost everywhere monarchical and the territorial notions of feudalism were still powerful, bore an obvious resemblance to the rights of a private individual over property, with the result that the international rules relating to territory are still in essentials the Roman rules of property. It is not difficult, therefore, to see how the belief in an ideal system of law inherently and universally binding on the one hand, and the existence of a cosmopolitan system of law everywhere revered on the other, should have led to the founding of international law on the law of nature. We have to inquire further,

however, whether this foundation is valid for us to-day.

The medieval conception of a law of nature is open to certain criticisms. In the first place, when all allowances have been made for the aid afforded by Roman law, it has to be admitted that it implied a belief in the rationality of the universe which seems to us to be exaggerated. It is true that when medieval writers spoke of natural law as being discoverable by reason, they meant that the Best human reasoning could discover it, and not, of course, that the results to which any and every individual's reasoning led him was natural law. The foolish criticism of Jeremy Bentham: 'a great multitude of people are continually talking of the law of nature; and then they go on giving you their sentiments about what is right and what is wrong; and these sentiments, you are to understand, are so many chapters and sections of the law of nature,'<sup>1</sup> merely showed a contempt for a great conception which Bentham had not taken the trouble to understand. Medieval controversialists might use arguments drawn from natural law to support almost any case, but there was nothing arbitrary about the conception itself, any more than a text of Scripture is arbitrary because the Devil may quote it. But

<sup>1</sup> *Principles of Morals and Legislation*, ch. ii. But Bentham himself, as Sir Frederick Pollock points out (*History of the Science of Politics*, p. 120), was unconsciously 'as much a dogmatist as any propounder of natural law'. He constructed a universal theory of legislation based on abstract considerations of human motives in general, such as they appeared to him, and without taking the slightest trouble to consult history or specific facts.

what medieval writers did not always realize was that what is reasonable, or, to use their own terminology, what the law of nature enjoins, can rarely receive a final definition: it is always, and above all in the sphere of human conduct, relative to conditions of time and place. We realize, as they hardly did, that these conditions are never standing still. For us as for them, a rational universe, even if we cannot prove it to be a fact, is a necessary postulate both of thought and action; and the difference between our thought and theirs is mainly that we have different ways of regarding the world and human society. When a modern lawyer asks what is reasonable, he looks only for an answer that is valid now and here, and not for one that is finally true; whereas a medieval writer might have said that if ultimate truth eludes our grasp, it is not because it is undiscoverable, but because our reasoning is imperfect. Some modern writers have expressed this difference by saying that what we have a right to believe in to-day is a law of nature *with a variable content*.

In the second place, when medieval writers spoke of natural law as able to overrule positive law in a case of conflict, they were introducing an anarchical principle which we must reject. But this was a principle which died hard, and even in the eighteenth century Blackstone could write: 'This law of nature being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe in all countries and at all times; *no human laws are of any*

*validity, if contrary to this.*<sup>1</sup> In Blackstone, however, such words were mere lip-service to a tradition, and had no effect on his exposition of the law. To hold, however, that unreasonableness can invalidate a rule of law is to confuse the function of legislation with that of ascertaining what existing law is. Law could never perform its proper function of a controlling force in society if courts of law did not hold themselves bound to subordinate their own ideas of what is reasonable to an assumed superior reasonableness in the law; that assumption may not always be well founded, but it is necessary to our social security that it should be acted upon until the law is altered.

These are valid criticisms, but they do not affect the permanent truths in the conception of a law of nature, and though to-day we generally use a different terminology, we recognize the validity of those truths as fully as ever. For one thing the law of nature stands for the existence of *purpose* in law, reminding us that law is not a meaningless set of arbitrary principles to be mechanically applied by courts, but that it exists for certain ends, though those ends may have to be differently formulated in different times and places. Thus where we might say that our aim is to embody social justice in law (giving to that term whatever interpretation is current in the thought of our time), a medieval thinker might have said that the validity of positive law must be tested by its conformity or otherwise to a law of higher obligation, the law of nature. Natural law, therefore, or a like

<sup>1</sup> *Commentaries on the Laws of England*, Introduction.



principle under some other name, is an essential underlying principle of the art of legislation. But that is not all; it is also a principle that is necessarily admitted into the actual administration of law. This is so because the life with which any system of law has to deal is too complicated, and human foresight too limited, for law to be completely formulated in a set of rules, so that situations perpetually arise which fall outside all rules already formulated. Law cannot and does not refuse to solve a problem because it is new and unprovided for; it meets such situations by resorting to a principle, outside formulated law, whose presence is not always admitted. In fact it falls back on the solution which the court or the jury think to be reasonable in all the circumstances. Even a slight acquaintance with the working of the English Common Law shows it perpetually appealing to reason as the justification of its decisions, asking what is a reasonable time, or what is a reasonable price, or what a reasonable man would do in given circumstances. We do not suppose that our answers to those questions will be scientific truths; it is enough if they are approximately just; but on the other hand we do not attempt to eliminate this test of reasonableness by substituting fixed rules, because it would be impossible to do so. But this appeal to reason is merely to appeal to a law of nature. Sometimes, indeed, English law still uses the term 'natural justice', and our courts have to do their best to decide what 'natural justice' requires in particular circumstances; for example, in 1924 the Northern Rhodesia Order in

Council, providing for the administration of that protectorate, enacted that in civil cases between natives Rhodesian courts were to be guided by native laws as far as applicable and *not repugnant to natural justice*. The Rhodesian courts will probably experience no difficulty in interpreting this instruction.

'The grandest function of the law of nature', Sir Henry Maine has written, 'was discharged in giving birth to modern international law';<sup>1</sup> and even if such a foundation had not been a sound one, no other would have been possible in the sixteenth century. Afterwards, in the seventeenth and eighteenth centuries, the medieval tradition of a law to which man's rational nature bids him everywhere and always to conform became obscured, and later writers returned to another meaning of the term which is to be found in Stoic and early Christian writers. They used it to denote a law under which men are supposed to have lived in a *state of nature*, that is to say, in an imaginary pre-political condition of human society.<sup>2</sup> This development had unfortunate effects on international law, but it will be convenient first to say something of the men whose writings first gave that law systematic form.

#### § 4. *The classical writers on International Law*

The recognition of international law as a separate object of study dates from the latter part of the sixteenth century. Earlier writers had written on some of the topics which fall within modern international

<sup>1</sup> *Ancient Law*, ch. iv.

<sup>2</sup> *Infra*, pp. 36, 38, 56.



law, especially on the usages of war and on the treatment of ambassadors; but they did not separate the legal from the theological and ethical, or the domestic from the international, aspects of such questions. Thus side by side with questions such as whether war is ever justified, what causes for going to war are lawful and what unlawful, what means of waging war are permissible, and the like, they discussed questions of tactics, of military discipline, or of the duties of a vassal to help his lord, without feeling that they were treating together topics which properly belonged to different subjects. Theological writers especially were concerned with the perplexing ethical problems to which the practice of warfare gives rise, and a series of great Spanish Churchmen of the fifteenth and sixteenth centuries made important contributions to the progress of thought on these matters. Perhaps the greatest of these was Francisco de Vitoria, Professor of Theology at Salamanca from 1526 to 1546, whose *Relectiones theologicae*, published after his death, contained, in two courses of lectures, the *Relectiones De Indis* and *De jure belli Hispanorum in Barbaros*, an examination of the title of the Spaniards to exercise domination over the inhabitants of the New World which is remarkable for its courageous defence of the rights of the Indians. The work of these early Spanish writers has been unfairly neglected, especially in Protestant countries, but in recent years interest in them has been revived and a more just appreciation of their importance is now accorded to them.

Alberico Gentili, commonly known as Gentilis, an Italian Protestant who fled to England to avoid persecution and became professor of Civil Law in Oxford, was perhaps the first writer to make a definite separation of international law from theology and ethics and to treat it as a branch of jurisprudence. 'Let theologians hold their peace', he writes, 'in work that belongs to others than they.' His most important work was the *De jure belli* published in 1598. To this book, Gentilis's more famous successor, Hugo de Groot, or Grotius, was, as he himself admitted, greatly indebted, but otherwise it appears to have exercised little influence, and the very name of Gentilis was almost forgotten until recent times.

Grotius was born in Holland in 1583, and died in 1645. Even as a boy he acquired a European reputation for learning, and as a man he became master of every subject to which he turned his interest. He was a lawyer, an historian, a poet, as well as a theologian whose great desire was to see the reunion of the Christian Church. Yet he lived the life, not of a student, but of a man of affairs, practising the law and serving in official positions. He became involved in disputes which were nominally concerned with matters of theology, but in which the real issue was a political one, the question whether the provinces of Holland should form a loose federal union or be consolidated under the House of Orange. Grotius supported the former and the losing cause. After being imprisoned for over two years, he escaped by the devotion of his wife in a box which his captors

supposed to contain books, and eventually became ambassador of Sweden at the French Court.

Grotius wrote two works on international law, the *De jure praedae* in 1604, and the *De jure belli ac pacis* in 1625. The former of these, in which he supported the claim of the Dutch East India Company to the capture of a prize from the Portuguese, was never published by him, and was not discovered until 1864. It was then found that a short work which he published anonymously in 1609, the *Mare liberum*, contending, in opposition to the claims of the Portuguese, that the open sea could not be appropriated by any state, had been written as one of the chapters of the *De jure praedae*.

Few books have won so great a reputation as the *De jure belli ac pacis*, but to regard its author as the 'founder' of international law is to exaggerate its originality and to do less than justice to the writers who preceded him; neither Grotius, nor any other single writer, can properly be said to have 'founded' the system. The reputation of the book was not wholly due to its own merits, though these are great; it was partly due to the time and circumstances of its publication. When he wrote it in 1625 Grotius was already so eminent that anything from his pen would have attracted attention. Further, he had the advantage of belonging to the country which in the seventeenth century was in many ways the leading country in Europe. The successful war of liberation by the Dutch against Spain in the previous century had heralded the rise of the modern state system; it

had been the first great triumph of the idea of nationality, and the successful assertion of the right of revolt against universal monarchy. In the seventeenth century they were the leaders of European civilization, teaching to other countries not only new methods of commerce but new conceptions of government based on freer institutions and on some measure of religious toleration. When the issue between absolutism and liberty was still doubtful in England, and when everywhere else absolutism was triumphant and destined to remain so until the French Revolution, the Dutch had settled the issue in their own country in favour of liberty. Even some of the qualities which render the book tedious to a modern reader, especially its voluminous citation of authorities from ancient history and the Bible, and its excessively subtle distinctions, commended it to the taste of contemporaries still familiar with the tradition of scholasticism.

Grotius' purpose was practical. He wrote on the laws of war because, as he says: \*

'I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations should be ashamed; men resorting to arms for trivial or for no reasons at all, and when arms were once taken up no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.'<sup>1</sup>

In contrast with this anarchy he proclaimed that even states ought to regard themselves as members of

<sup>1</sup> *Prolegomena*, 28.

a society, bound together by the universal supremacy of justice. Man, he said, is not a purely selfish animal, for among the qualities that belong to him is an *appetitus societatis*, a desire for the society of his own kind, and the need of preserving this society is the source of natural law, which he defines as:

'The dictate of right reason, indicating that an act, from its agreement or disagreement with the rational and social nature of man, has in it moral turpitude or moral necessity, and consequently that such an act is either forbidden or commanded by God the author of nature.'<sup>1</sup>

Besides being subject to natural law, he says, the relations of peoples are subject to *jus gentium*; for just as in each state the civil laws look to the good of the state, so there are laws established by consent which look to the good of the great community of which all or most states are members, and these laws make up *jus gentium*. It is obvious that this is a very different meaning from that which the term bore in the Roman law;<sup>2</sup> there, as we have seen, it stood for that part of the *private* law of Rome which was supposed to be common to Rome and other peoples; whereas in Grotius it has come to be a branch of *public* law, governing the relations between one people and another. It is important, Grotius tells us, to keep the notions of the law of nature and the law of nations (to adopt a mis-translation of *jus gentium* which its new meaning makes almost necessary) distinct; but he is far from doing so himself. Nor was it possible for him to do so, as is

<sup>1</sup> Book I, ch. i, 10 (1).

<sup>2</sup> *Supra*, p. 17.

apparent from his own statement of how their respective contents are to be discovered. He used, he tells us, the testimony of philosophers, historians, poets, and orators, not because they were themselves conclusive witnesses, but because when they were found to be in agreement, their agreement could only be explained in one of two ways: either what they said must be a correct deduction from the principles of reason, and so a rule of the law of nature; or else it must be a matter in which common consent existed, and so a rule of the law of nations. Thus in effect the two terms, as we have already seen, still express the theoretical and the practical sides of the same idea.

Like all thinkers who try to understand the meaning and bases of law, Grotius had to meet the perennial and plausible arguments of those who would identify justice with mere utility. His answer was clear and convincing. Justice, he said, is indeed the highest utility, and merely on that ground neither a state nor the community of states can be preserved without it. But it is also more than utility, because it is part of the true social nature of man, and that is its real title to observance by him.

Grotius' work consisted in the application of these fundamental principles to war; for he says:

'It is so far from being right to admit, as some imagine, that in war all rights cease, that war ought never to be undertaken except to obtain a right; nor, when undertaken, ought it to be carried on except within the bounds of right and good faith. . . . Between enemies those laws



which nature dictates or the consent of nations institutes are binding.<sup>1</sup>

The first book, therefore, inquires whether war can ever be *justum*, lawful or regular; and as Grotius was of opinion that one requirement necessary to make a war lawful was that it should be waged under the authority of one who held supreme power in the state, he was led to inquire into the nature of sovereignty. His treatment of this subject was unsatisfactory and confused. By denying that government necessarily exists for the sake of the governed, and treating sovereignty as a proprietary right, a *jus regendi* capable of vesting in sovereigns as fully and by the same titles as rights over corporeal things vest in private persons, Grotius encouraged the unfortunate trend of opinion towards a view of sovereignty as absolute and irresponsible power. He had to admit, too, writing when he did, that wars waged by subordinate feudatory princes who could only be regarded as holding *summa potestas* by a transparent fiction might be lawful, and this made much of his exposition of the subject inconsistent with his own definition. In the second book Grotius dealt with the causes of war, and in effect reduced the causes of lawful wars to two, the defence of person or property and the punishment of offenders. He then proceeded to examine such questions as what constitutes the property of a state, for example, how far the sea may do so, how property is acquired and lost, and other questions which a modern writer would either place

<sup>1</sup> *Prolegomena*, 25, 26.



under the international law of peace, or exclude from international law altogether. In the third book he dealt with topics which fall under the modern laws of war, that is to say, with the question what acts are permissible and what are forbidden in the conduct of war. Here his plan was not only to state the strict laws of war, but to add what he called *temperamenta*, alleviations or modifications designed to make war more humane.

It is usual in estimating the work of Grotius to speak of its remarkable and instantaneous success; and if it is a proof of success that within a few years of its author's death his book had become a university textbook, that it has often since been appealed to in international controversies, that it has been republished and translated scores of times, and that every subsequent writer treats his name with reverence, however widely he may depart from his teaching, then Grotius must be accounted successful. But if by success is meant that the doctrines of Grotius as a whole were accepted by states and became part of the law which since his time has regulated their relations, then his work was an almost complete failure. It is true that some of his doctrines have since become established law. For instance, the doctrine that the open sea cannot be subjected to the sovereignty of any state and many of the *temperamenta* of war that he suggested have been incorporated into international law; but these particular changes were due at least as much to changes in the character of navigation and in the technique of war respectively as to Grotius. At the

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heart of his system lay the attempt to distinguish between lawful and unlawful war, *bellum justum* and *bellum injustum*; he saw that international order is precarious unless that distinction can be established, just as national order would be precarious if the law within the state did not distinguish between the lawful and the unlawful use of force. But this distinction never became part of actual international law.

In attempting to establish this distinction Grotius was following a tradition which the classical writers on international law had inherited from the theologians and canonists of the Middle Ages; indeed it goes back as far as to Saint Augustine in the fourth century of the Christian era. But he was well aware of the difficulties of making it prevail in view of the obstinate fact that states persisted in treating the making of war as a matter of policy and not of law. He summed up these difficulties under two main heads.<sup>1</sup> One was that of knowing which of the parties to any particular war had the right on his side; the other was the danger that other states incur if they presume to judge of the rights and wrongs of a war and take action to restrain the wrong-doer. Any scheme for eliminating war has still to grapple with these two difficulties; the first is our modern problem of determining the 'aggressor', and the second is that of 'collective security', of somehow placing behind the law the united force of the society of states, while ensuring at the same time protection to the states which lend their help. Neither Grotius nor the

<sup>1</sup> *De jure belli ac pacis*, iii. 4. 4.

writers who followed him in the seventeenth and eighteenth centuries could see any way of overcoming these difficulties, and he fell back on the lame conclusion that the only practical course was not to ask third states to judge of the lawfulness or otherwise of a war, but to leave that question to the conscience of the belligerents.

It has to be admitted, therefore, that the attempt to establish a distinction in the law between the lawful and the unlawful occasions of making war was largely unreal, and it was retained by most of Grotius' successors more as an ornament to their theme than as a doctrine in which they seriously believed. Finally it disappeared even from theory, and international law came frankly to recognize that all wars are equally lawful. As the most authoritative of modern English writers on the subject says:

'International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights.'<sup>1</sup>

The foundation of the League of Nations in 1919 marks the first real attempt to falsify this confession of weakness and to embody in actual law the cardinal principle of Grotius's system.

Richard Zouche, 1590-1660, Professor of Civil Law in Oxford University and judge of the Court of

<sup>1</sup> W. E. Hall, *International Law*, 8th ed., p. 82.

Admiralty, was a prolific writer on legal subjects, among his works being one on international law, the *Jus et judicium feciale, sive jus inter gentes*, published in 1650. This has been called 'the first manual of international law',<sup>1</sup> for it discusses briefly but clearly almost every part of the subject. Without abandoning the law of nature as one of the bases of international law, Zouche preferred to deduce the law from the precedents of state practice, and he is sometimes regarded as a precursor of the 'positive' school of international lawyers, who regard the practice of states as the only source of law. Zouche introduced one important improvement of method, for he was the first writer to make a clear division between the law of peace and the law of war, and to make the former the more prominent of the two. This was necessary before war could be regarded, as it ought to be, as an abnormal relation between states.

Samuel Pufendorf, 1632-94, Professor at Heidelberg, and afterwards at Lund in Sweden, published his *De jure naturae et gentium* in 1672, and may be regarded as the founder of the so-called 'naturalist' school of writers. He denied any binding force to the practice of nations and based his system wholly on natural law, but on a natural law in the new and debased form of a law supposed to be binding upon men in an imaginary *state of nature*.<sup>2</sup> There are traces of this conception in Grotius, but it had little influence on his system; for his law of nature was a law

<sup>1</sup> Scelle, *Fondateurs de droit international*, p. 322.

<sup>2</sup> *Supra*, p. 25; *infra*, p. 56.

of reason directing men at all times, whether organized in political societies or not, and only in this sense has the conception any permanent validity.

Cornelius van Bynkershoek (1673-1743), a Dutch judge, was the author of works on special topics of international law, of which the most important was the *Quaestiones juris publici*, published in 1737. Bynkershoek had an intimate knowledge of questions of maritime and commercial practice, and he has an important place in the development of that side of international law. He belongs to the 'positive' school of writers, basing the law on custom, but holding also that custom must be explained and controlled by reason, which he refers to as *ratio juris gentium magistra*.<sup>1</sup> He held also that the recent practice of states was more valuable evidence of custom than the illustrations from ancient history with which his predecessors had generally adorned their works, since, 'as customs change, so the law of nations changes';<sup>2</sup> but he attached more weight to the stipulations of particular treaties as evidence of the existence of custom than modern practice would allow.

Emerich de Vattel (1714-69), whose work *Le Droit des gens* was published in 1758, was a Swiss who served in the diplomatic service of Saxony. He intended his work as a manual for men of affairs, and was a popularizer of other men's ideas rather than an original thinker; yet he has probably exercised a greater permanent influence than any other writer on international law, and his work is still sometimes cited as

<sup>1</sup> *Quaestiones*, Book I, ch. 12.

<sup>2</sup> *Ibid.*, *Ad lectorem*.



an authority in international controversies. He accepted the doctrine of the *state of nature*; 'nations being composed of men naturally free and independent, and who before the establishment of civil societies lived together in the state of nature; nations or sovereign states must be regarded as so many free persons living together in the state of nature'; and since men are naturally equal, so are states; 'strength or weakness produce in this regard no distinction. A dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom' (Introduction). Thus the doctrine of the equality of states, a misleading deduction from unsound premisses,<sup>1</sup> was introduced into the theory of international law.

According to Vattel the law of nations *in its origin* is merely the law of nature applied to nations, it is not subject to change, and treaties or customs contrary to it are unlawful. But other elements have been admitted into the law; for, says Vattel, natural law itself establishes the freedom and independence of every state, and therefore each is the sole judge of its own actions and accountable for its observance of natural law only to its own conscience. Other states may *request* it to reform its conduct; but what they may actually *demand* from it is something much less. This lower standard of *enforceable* duties Vattel calls the *voluntary* law of nations, because it is to be presumed that states have agreed to it, in contrast with the other element of natural or, as he calls it, *necessary* law. 'Let

<sup>1</sup> *Infra*, p. 115.



each sovereign make the *necessary* law the constant rule of his conduct; he must allow others to take advantage of the *voluntary law of nations*' (Book III, ch. 12).

This exaggerated emphasis on the independence of states had the effect in Vattel's system of reducing the natural law, which Grotius had used as a juridical barrier against arbitrary action by states towards one another, to little more than an aspiration after better relations between states; yet for the *voluntary* law, which was the only part of Vattel's system which had a real relation to the practice of states, he provided no sound basis in theory, for he was unable to explain the source of the obligation of states to observe it. The results of this unsatisfactory division were unfortunate. For instance, Vattel tells us that by the *necessary* law a state has a duty to maintain freedom of commerce, because this is for the advantage of the human race; but by the *voluntary* law it may impose such restrictions upon it as suits its convenience, for its duties to itself are more important than its duties to others (Book II, ch. 2). By *necessary* law, again, there are only three lawful causes of war, self-defence, redress of injury, and punishment of offences; but by *voluntary* law we must always assume that each side has a lawful cause for going to war, for 'princes may have had wise and just reasons for acting thus, and that is sufficient at the tribunal of the voluntary law of nations' (Book II, ch. 18).

In some respects, however, Vattel's system was an advance on those of his predecessors. He stood for a

humaner view of the rights of war. He rejected the patrimonial theory of the nature of government which Grotius had held; 'this pretended right of ownership attributed to princes is a chimera begotten of an abuse of the laws relating to the inheritances of individuals. The state is not, and cannot be, a patrimony, since a patrimony exists for the good of the owner, whereas the prince is appointed only for the good of the state' (I. 5). He recognized in certain circumstances the right of part of a nation to separate itself from the rest (I. 17), a doctrine which partly explains his great popularity in the United States, where a copy of the work was first received in 1775. Professor De Lapradelle has justly written of him that,

'before the great events of 1776 and 1789 occurred, he had written an international law, based on the principles of public law which two Revolutions, the American and the French, were to make effective. . . . Vattel's *Law of Nations* is international law based on the principles of 1789 . . . the projection upon the plane of the law of nations of the great principles of legal individualism. That is what makes Vattel's work important, what accounts for his success, characterizes his influence, and eventually, likewise, measures his shortcomings. Grotius had written the international law of absolutism, Vattel has written the international law of political liberty.'<sup>1</sup>

All the same, the survival of Vattel's influence into an age when the 'principles of legal individualism' are no longer adequate to international needs, if they

\* Introduction to the Carnegie edition of Vattel, 1916.

ever were, has been a disaster for international law. By making independence the 'natural' state of nations, he made it impossible to explain or justify their subjection to law; yet their independence is no more 'natural' than their interdependence. Both are facts of which any true theory of international relations must take account; the former is a more conspicuous, but not a more real, fact than the latter. It is true that in Vattel's own day the interdependence of states was less conspicuous in international practice than it is to-day; and this partly excuses the one-sidedness of his system. None the less, by cutting the frail moorings which bound international law to any sound principle of obligation he did it an injury which has not yet been repaired.

## II

# CHARACTER OF THE MODERN SYSTEM

### § 1. *The International Society*

LAW can only exist in a society, and there can be no society without a system of law to regulate the relations of its members with one another. If then we speak of the 'law of nations', we are assuming that a 'society' of nations exists, and the assumption that the whole of the civilized world constitutes in any real sense a single society or community is one which we are not justified in making without examination. In any case the character of the law of nations is necessarily determined by that of the society within which it operates, and neither can be understood without the other.

The law of nations had its origin among a few kindred nations of western Europe which, despite their frequent quarrels and even despite the religious schism of the sixteenth century, had all and were all conscious of having a common background in the Christian religion and the civilization of Greece and Rome. They were in a real sense a society of nations. But the rise of the modern state system undermined the tradition of the unity of Christendom, and eventually gave rise to those sentiments of exclusive nationalism which are rife in the world to-day. It is true that side by side with this development there has

been an immense growth of the factors that make states mutually dependent on one another. Modern science has given us vastly increased facilities and speed of communications, and modern commerce has created demands for the commodities of other nations which even the extravagances of modern economic nationalism are not able to stifle. If human affairs were more wisely ordered, and if men were clearer-sighted than they are in seeing their own interests, it may be that this interdependence of the nations would lead to a strengthening of their feelings of community. But their interdependence is mainly in material things, and though material bonds are necessary, they are not enough without a common social consciousness; without that they are as likely to lead to friction as to friendship. Some sentiment of shared responsibility for the conduct of a common life is a necessary element in any society, and the necessary force behind any system of law; and the strength of any legal system is proportionate to the strength of such a sentiment.

Hobbes in the *Leviathan*<sup>1</sup> has described the relations of states to one another as they appeared to him to be in a famous passage: 'Kings and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; their forts, and garrisons, and guns upon the frontiers of their kingdoms, and continual spies upon their neighbours; which is a posture of war.' Perhaps there has never been a time

<sup>1</sup> Ch. 13.



when this description was more nearly true than it is to-day, when men were more cruel to one another, and when persecution of those who differ from the majority in race or language or religion was more rife. All this makes it not easy to believe to-day in the reality of a single world society, and it would be foolish to underrate the difficulties of creating one. Those difficulties indeed have not decreased, but have rather been intensified since the sixteenth century, and there have been two developments in particular which have profoundly affected the fortunes of international law. One has been the expansion of the system from being the law of the small family of nations among which it arose into one that is world-wide and now claims the allegiance of nations which had no part in building it up, and which either have never known, or no longer accept, the fundamental beliefs and sentiments on which it was originally founded. Some of these nations at least are inclined to look on international law as an alien system which the western nations, whose moral or intellectual leadership they no longer recognize, are trying to impose upon them, and in effect they have begun to claim the right to select from among its rules only those which suit their interests or which arise out of agreements to which they have themselves been parties.

The other weakening development just referred to has been a profound change in our ideas of the nature of law. We have seen how international law had its origin in natural law, that is to say, in the belief that



nations must be bound to one another by law because it is a principle of nature that this world should be a system of order and not a chaos, and that therefore states, despite their independence, can be no exception to this universal rule. But with the passing of the Middle Ages this view of the nature of law was gradually dethroned by the growth of positivist theories according to which all law is nothing but the command of a superior will to an inferior. For international law this modern view of law has been especially unfortunate, but that is a matter to which it will be necessary to return. Here it need only be pointed out that the result of positivism has been to secularize the whole idea of law and thus to weaken the moral foundation which is essential to the vitality of all legal obligation.

There is therefore much in the prospect to discourage those who realize that the strengthening of international law must depend on the strengthening of the bonds that hold states together in an international society. Yet there is one solid ground for hope. We have begun to realize that a world society will not come into existence without conscious human effort. That is a new factor in the problem, for until recently, if we have thought about the question at all, most of us have assumed that international society and international law might be left to grow unaided. We have begun to see, however, that though the problem of world community remains essentially a moral problem, it is also in part a problem of statesmanship, and that international society needs

institutions through which its members can learn to work together for common social ends. The League of Nations was the first great experiment with that end in view, and we know that it did not succeed. We are making a second attempt now with the United Nations, and hitherto this too has disappointed our hopes. But it is right that we should remember that only one generation has passed since men began to look on the building of a world community as a practical problem, and less than that since most of us began to see that the problem is really urgent.

§ 2. *The Modern 'Sovereign' State*

The preceding chapter has traced in outline the course of that curious metamorphosis which transformed the doctrine of sovereignty from a principle of internal order, as Bodin and even Hobbes had conceived it, into one of international anarchy. Starting in Bodin as a formal juristic concept, the attribute of a personal monarch entrusted by the constitution with supreme authority over the ordinary laws of the state, sovereignty, under the impulsion of the historical developments which took place in the character of European governments, came to be regarded as power absolute and above the law, and eventually, when it had become impossible to fix the location of such power in any definite person or organ within the state, as the attribute of the personified state itself. The doctrine was developed for the most part by political theorists who were not interested in, and paid little regard to, the

relations of states with one another, and in its later forms it not only involved a denial of the possibility of states being subject to any kind of law, but became an impossible theory for a world which contained more states than one.

Writers on international law have attempted in many ingenious ways to reconcile the existence of their subject with the doctrine of the absolute sovereignty of states, but all these devices are in effect variations of the theory of the auto-limitation of sovereignty which is referred to later in this chapter.<sup>1</sup> One formula, for example, is to say that international law is a law of *co-ordination* but not of *subordination*, and even Oppenheim, though he was no believer in absolute sovereignty, yet felt obliged, to attribute to international law a specific character not shared by law in general, and tells us that it is usually regarded as a law *between*, but not *above*, the several states.<sup>2</sup> Yet if states are the subjects of international law, as Oppenheim admits that they are, the law must surely be above them, and they must be subordinate to it.

Unfortunately the international lawyer cannot rid his subject of the incubus of the doctrine of sovereignty by showing that it is one of those concepts which, as a great American judge has warned us,<sup>3</sup> become our tyrants rather than our servants when they are treated as real existences and developed

<sup>1</sup> *Infra*, p. 54.

<sup>2</sup> *International Law*, vol. i, 6th ed., p. 6.

<sup>3</sup> Cardozo, *Paradoxes of Legal Science*, p. 65.

with disregard of their consequences to the limit of their logic. We ought to deal with our concepts, he tells us, always as provisional hypotheses to be reformulated and restrained when they have an outcome in oppression and injustice. But sovereignty, however much it may need reformulating as a political doctrine, does stand to-day for something in the relations of states which is both true and very formidable. It expresses, though in a misleading way, the claims that states habitually make to act as seems good to them without restraint on their freedom. An American Commission which was formed during the last war to study the organization of peace has summarized these claims conveniently.

‘A sovereign state’, says the Commission’s report, ‘at the present time claims the power to judge its own controversies, to enforce its own conception of its rights, to increase its armaments without limit, to treat its own nationals as it sees fit, and to regulate its economic life without regard to the effect of such regulations upon its neighbours. These attributes of sovereignty must be limited.’<sup>1</sup>

Thus for the practical purposes of the international lawyer sovereignty is not a metaphysical concept, nor is it part of the essence of statehood; it is merely a term which designates an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states. To the extent that sovereignty has come to imply that there is something inherent in the nature

<sup>1</sup> *International Conciliation Pamphlet*, 1941.

of states that makes it impossible for them to be subjected to law, it is a false doctrine which the facts of international relations do not support. But to the extent that it reminds us that the subjection of states to law is an aim as yet only very imperfectly realized, and one which presents the most formidable difficulties, it is a doctrine which we cannot afford to disregard.

The fundamental difficulty of subjecting states to the rule of law is the fact that states possess power. The legal control of power is always difficult, and it is not only for international law that it constitutes a problem. The domestic law of every state has the same problem, though usually (but not, as the persistence of civil wars proves, invariably) in a form less acute. In any decently governed state domestic law can normally deal effectively with the behaviour of individuals, but that is because the individual is weak and society is relatively strong; but when men join together in associations or factions for the achievement of some purpose which the members have in common the problem of the law becomes more difficult. Union always gives strength, and when the members of these bodies are numerous, when they can command powerful resources, and when they feel strongly that the interests which their combination exists to protect are vital to themselves, they often develop a tendency to pursue their purposes extra-legally, or even illegally, without much regard to the legal nexus which nominally binds them to the rest of the society of which they are a part. In fact,



they behave inside the state in a way that is fundamentally similar to, though ordinarily it is less uncompromising than, the way in which sovereign states behave in the international society. Sovereignty is simply the culminating point of a tendency that is apt to recur in the conduct of any group of human beings which is strong and determined enough to insist on having its own way, and of all human groups states are the strongest. The problem of subjecting them to law is more difficult than, but it is essentially similar to, that which confronts the state in its treatment of powerful associations within itself.

§ 3. *The Basis of Obligation in Modern International Law*

Traditionally there are two rival doctrines which attempt to answer the question why states should be bound to observe the rules of international law.

The doctrine of 'fundamental rights' is a corollary of the doctrine of the 'state of nature', in which men are supposed to have lived before they formed themselves into political communities or states; for states, not having formed themselves into a super-state, are still supposed by the adherents of this doctrine to be living in such a condition. It teaches that the principles of international law, or the primary principles upon which the others rest, can be deduced from the essential nature of the state. Every state, by the very fact that it is a state, is endowed with certain fundamental, or inherent, or natural, rights. Writers differ in enumerating what these rights are, but generally



five rights are claimed, namely, self-preservation, independence, equality, respect, and intercourse. It is obvious that the doctrine of fundamental rights is merely the old doctrine of the natural rights of man transferred to states. That doctrine has played a great part in history; Locke justified the English Revolution by it, and from Locke it passed to the leaders of the American Revolution and became the philosophical basis of the Declaration of Independence. But hardly any political scientist to-day would regard it as a true philosophy of political relations, and all the objections to it apply with even greater force when it is applied to the relations of states. It implies that men or states, as the case may be, bring with them into society certain primordial rights not derived from their membership of society, but inherent in their personality as individuals, and that out of these rights a legal system is formed; whereas the truth is that a legal right is a meaningless phrase unless we first assume the existence of a legal system from which it gets its validity. Further, the doctrine implies that the social bond between man and man, or between state and state, is somehow less natural, or less a part of the whole personality, than is the individuality of the man or the state, and that is not true; the only individuals we know are individuals-in-society. It is especially misleading to apply this atomistic view of the nature of the social bond to states. In its application to individual men it has a certain plausibility because it seems to give a philosophical justification to the common feeling that

human personality has certain claims on society; and in that way it has played its part in the development of human liberty. But in the society of states the need is not for greater liberty for the individual states, but for a strengthening of the social bond between them, not for the clamant assertion of their rights, but for a more insistent reminder of their obligations towards one another. Finally, the doctrine is really a denial of the possibility of development in international relations; when it asserts that such qualities as independence and equality are inherent in the very nature of states, it overlooks the fact that their attribution to states is merely a stage in an historical process; we know that until modern times states were not regarded either as independent or equal, and we have no right to assume that the process of development has stopped. On the contrary it is not improbable, and it is certainly desirable, that there should be a movement towards the closer interdependence of states, and therefore away from the state of things which this doctrine would stabilize as though it were part of the fixed order of nature.

The doctrine of positivism, on the other hand, teaches that international law is the sum of the rules by which states have *consented* to be bound, and that nothing can be law to which they have not consented. This consent may be given expressly, as in a treaty, or it may be implied by a state acquiescing in a customary rule. But the assumption that international law consists of nothing save what states have consented to is an inadequate account of the system as it can be

seen in actual operation, and even if it were a complete account of the contents of the law, it would fail to explain why the law is binding. It is, in the first place quite impossible to fit the facts into a consistently consensual theory of the nature of international law. *Implied* consent is not a philosophically sound explanation of customary law, international or municipal; a customary rule is observed, not because it has been consented to, but because it is believed to be binding, and whatever may be the explanation or the justification for that belief, its binding force does not depend, and is not felt by those who follow it to depend, on the approval of the individual or the state to which it is addressed. Further, in the practical administration of international law, states are continually treated as bound by principles which they cannot, except by the most strained construction of the facts, be said to have consented to, and it is unreasonable, when we are seeking the true nature of international rules, to force the facts into a preconceived theory instead of finding a theory which will explain the facts as we have them. For example, a state which has newly come into existence does not in any intelligible sense *consent* to accept international law; it does not regard itself, and it is not regarded by others, as having any option in the matter. The truth is that states do not regard their international legal relations as resulting from consent, except when the consent is express, and that the theory of implied consent is a fiction invented by the theorist; only a certain plausibility is given to a consensual explanation of the nature of their

obligations by the fact, important indeed to any consideration of the methods by which the system develops, that, in the absence of any international machinery for legislation by majority vote, a *new* rule of law cannot be imposed upon states merely by the will of other states.

But in the second place, even if the theory did not involve a distortion of the facts, it would fail as an explanation. For consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting. To say that the rule *pacta servanda sunt* is itself founded on consent is to argue in a circle. A consistently consensual theory again would have to admit that if consent is withdrawn, the obligation created by it comes to an end. Most positivist writers would not admit this, but to deny it is in effect to fall back on an unacknowledged source of obligation, which, whatever it may be, is not the consent of the state, for that has ceased to exist. Some modern German writers, however, do not shrink from facing the full consequences of the theory of a purely consensual basis for the law; they have inherited from Hegel a doctrine known as the 'auto-limitation of sovereignty', which teaches that states are sovereign persons, possessed of wills which reject all external limitation, and that if we find, as we appear to do in international law, something which limits their wills, this limiting something can only proceed from themselves. Most of these writers admit that a self-imposed limitation is

no limitation at all; and they conclude therefore that so-called international law is nothing but 'external public law' (*äusseres Staatsrecht*), binding the state only because, and only so long as, it consents to be bound. There is no flaw in this argument; the flaw lies in the premisses, because these are not derived, as all positivist theory professes to be, from an observation of international facts. The real contribution of positivist theory to international law has been its insistence that the rules of the system are to be ascertained from observation of the practice of states and not from *a priori* deductions, but positivist writers have not always been true to their own teaching; and they have been too ready to treat a method of legal reasoning as though it were an explanation of the nature of the law.

There need be no mystery about the source of the obligation to obey international law. The same problem arises in any system of law and it can never be solved by a merely *juridical* explanation.<sup>1</sup> The answer must be sought outside the law, and it is for legal philosophy to provide it. The notion that the validity of international law raises some peculiar problem arises from the confusion which the doctrine of sovereignty has introduced into international legal theory. Even when we do not believe in the absoluteness of state sovereignty we have allowed ourselves to be persuaded that the fact of their sovereignty makes it necessary to look for some specific quality, not to be found in other kinds of law, in the law to which states

<sup>1</sup> Cf. Triepel, *Droit international et droit interne*, p. 81.



are subject. We have accepted a false idea of the state as a personality with a life and a will of its own, still living in a 'state of nature', and we contrast this with the 'political' state in which individual men have come to live. But this assumed condition of states is the very negation of law, and no ingenuity can explain how the two can exist together. It is a notion as false analytically as it admittedly is historically. The truth is that states are not persons, however convenient it may often be to personify them; they are merely *institutions*, that is to say, organizations which men establish among themselves for securing certain objects, of which the most fundamental is a system of order within which the activities of their common life can be carried on. They have no wills except the wills of the individual human beings who direct their affairs; and they exist not in a political vacuum but in continuous political relations with one another. Their subjection to law is as yet imperfect, though it is real as far as it goes; the problem of extending it is one of great practical difficulty, but it is not one of intrinsic impossibility. There are important differences between international law and the law under which individuals live in a state, but those differences do not lie in metaphysics or in any mystical qualities of the entity called state sovereignty.

The international lawyer then is under no special obligation to explain why the law with which he is concerned should be binding upon its subjects. If it were true that the essence of all law is a command, and that what makes the law of the state binding is



that for some reason, for which no satisfactory explanation can ever be given, the will of the person issuing a command is superior to that of the person receiving it, then indeed it would be necessary to look for some special explanation of the binding force of international law. But that view of the nature of law has been long discredited. If we are to explain why any kind of law is binding, we cannot avoid some such assumption as that which the Middle Ages made, and which Greece and Rome had made before them, when they spoke of natural law. The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.

#### § 4. *The Sources of Modern International Law*

Article 38 of the Statute of the International Court of Justice directs the Court to apply:

- (1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (2) International custom, as evidence of a general practice accepted as law;
- (3) The general principles of law recognized by civilized nations;
- (4) Subject to the provisions of Article 59,<sup>1</sup> judicial

<sup>1</sup> This article provides that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'.

decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This is a text of the highest authority, and we may fairly assume that it expresses the duty of any tribunal which is called upon to administer international law.

(a) *Treaties as a source of law*

'Agreement is a law for those who make it, which supersedes, supplements, or derogates from the ordinary law of the land. *Modus et conventio vincunt legem.*'<sup>1</sup> It is natural, therefore, to find that in seeking the law applicable to the facts of a particular case the Court is first directed to inquire whether the general law, under which their rights would otherwise fall to be determined, has been excluded by an agreement between them. There is indeed more scope for the application of this maxim in international than there is in municipal law, for municipal law generally includes a great number of peremptory rules the application of which cannot be excluded by agreement between the parties, whereas in international law almost complete freedom of contract prevails.

Treaties then are clearly a source of law for the parties to them, of 'special' or 'particular' law. But can we go farther and describe them in any sense as a source of 'general' international law? Certainly it is only a special class of treaty which has any claim to be so regarded. The ordinary treaty by which two or more states enter into engagements with one

<sup>1</sup> Salmond, *Jurisprudence*, p. 31.

another for some special object can very rarely be used even as evidence to establish the existence of a rule of general law; it is more probable that the very reason of the treaty was to create an obligation which would not have existed by the general law, or to exclude an existing rule which would otherwise have applied. Still less can such treaties be regarded as actually creating new law. The only class of treaties which it is admissible to treat as a source of general law are those which a large number of states have concluded for the purpose either of declaring their understanding of what the law is on a particular subject, or of laying down a new general rule for future conduct, or of creating some international institution. Such treaties are, as will appear in the next chapter, the substitute in the international system for legislation, and they are conveniently referred to as 'law-making' treaties; their number is increasing to-day so rapidly that the 'conventional law of nations', which is the name given to the law which they create, has taken its place beside the older customary law and already far surpasses it in volume. These terms are convenient, and they are not inaccurate, for it is not necessary that all the rules of a legal system should be binding on all the members of a community. But it must always be borne in mind that even a law-making treaty is subject to the limitation which applies to other treaties that it does not bind states which are not parties to it. Thus except in the almost impossible event of every state in the world becoming a party to one of these treaties, the law which it creates will not

be law for every state. Some writers attempt to meet this difficulty by saying that the law which these treaties create is 'general', but not 'universal', international law; but the terminology is not very happy, nor does it really meet the crux of the difficulty. The real justification for ascribing a law-making function to these treaties is the practical one already referred to, that they do in fact perform the function which a legislature performs in a state, though they do so only imperfectly; and that they are the only machinery which exists for the purposive adapting of international law to new conditions and in general for strengthening the force of the rule of law between states. Moreover, there is something artificial in saying, even if it is strictly true in theory, that such important institutions of international life as the Universal Postal Union, or the International Court of Justice, or the United Nations with its multifarious activities, are nothing but contractual arrangements between certain states. It is right that we should look behind the form of these treaties to their substantial effect.

(b) *Custom as a source of law*

Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that if the usage is departed from some sort of evil consequences will probably, or at any rate ought to, fall on the transgressor; in technical language there must be a 'sanction', though the exact

nature of this need not be very distinctly envisaged. Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of states; that is to say, we must look at what states do in their relations with one another and attempt to understand why they do it, and in particular whether they recognize an obligation to adopt a certain course, or, in the words of Article 38, we must examine whether the alleged custom shows 'a general practice accepted as law'. Such evidence will obviously be very voluminous and also very diverse. There are multifarious occasions on which persons who act or speak in the name of a state do acts or make declarations which either express or imply some view on a matter of international law. Any such act or declaration may, so far as it goes, be some evidence that a custom, and therefore that a rule of international law, does or does not exist; but, of course, its value as evidence will be altogether determined by the occasion and the circumstances. States, like individuals, often put forward contentions for the purpose of supporting a particular case which do not necessarily represent their settled or impartial opinion; and it is that opinion which has to be ascertained with as much certainty as the nature of the case allows. Particularly important as sources of evidence are diplomatic correspondence; official instructions to diplomatists, consuls, naval and military commanders; acts of state legislation and decisions of state courts, which, we may presume, will not deliberately contravene any rule regarded as a rule of international law by the



state; opinions of law officers, especially when these are published, as they are in the United States.

In applying the forms of evidence which have been enumerated above in order to establish the existence of an international custom what is sought for is a general recognition among states of a certain practice as obligatory. It would hardly ever be practicable, and all but the strictest of positivists admit that it is not necessary, to show that every state has recognized a certain practice, just as in English law the existence of a valid local custom or custom of trade can be established without proof that every individual in the locality, or engaged in the trade, has practised the custom. This test of *general* recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international, not to be susceptible of exact or final formulation. When a system of customary law is administered by courts, which perpetually reformulate and develop its principles, as has happened in the English Common Law, its uncertainty is so much reduced that it is hardly, if at all, greater than the uncertainty which attaches to enacted or to codified law; but the clarifying influence of courts is only beginning to be felt in international law. It is therefore even less possible to formulate its principles dogmatically than to formulate those of a national system of law. The difference, however, is not one between uncertainty and certainty in formulation, but merely between a greater and a less degree of uncertainty.

The growth of a new custom is always a slow pro-



cess, and the character of international society makes it particularly slow in the international sphere. The progress of the law therefore has come to be more and more bound up with that of the law-making treaty. But it is possible even to-day for new customs to develop and to win acceptance as law when the need is sufficiently clear and urgent. A striking recent illustration of this is the rapid development of the principle of sovereignty over the air.<sup>1</sup>

(c) *The general principles of law*

Article 38 of the Statute of the Court directs it to refer to 'the general principles of law recognized by civilized nations'.<sup>2</sup> The phrase is a wide one; it includes, though it is not limited to, the principles of private law administered in national courts where these are applicable to international relations. Private law, being in general more developed than international law, has always constituted a sort of reserve store of principles upon which the latter has been in the habit of drawing. Roman law, as we have seen, was so drawn upon by the early writers on international law, and the process continues, for the good reason that a principle which is found to be generally accepted by civilized legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system.

<sup>1</sup> *Infra*, p. 171.

<sup>2</sup> The best commentary on the significance of this paragraph in the Statute is in Lauterpacht, *Private Law Sources and Analogies of International Law*.

Prescription, estoppel, *res judicata*, are examples of such principles.

The paragraph then introduces no novelty into the system, for the 'general principles of law' are a source to which international courts have instinctively and properly referred in the past. But its inclusion is important as a rejection of the positivist doctrine, according to which international law consists solely of rules to which states have given their consent. It is an authoritative recognition of a dynamic element in international law, and of the creative function of the courts which administer it.

(d) *Judicial precedents*

- These are described in Article 38 of the Statute as a 'subsidiary means for the determination of rules of law', and the words accurately state their function. Precedents are not binding authorities in international law, but the English theory of their binding force merely elevates into a dogma a natural tendency of all judicial procedure. When any system of law has reached a stage at which it is thought worth while to report the decisions and the reasoning of judges, other judges inevitably give weight, though not necessarily decisive weight, to the work of their predecessors or colleagues. There has hitherto been only a restricted scope for the operation of this tendency in international law for the practical reason that international adjudications have been relatively few, and reports have not been very readily accessible. This state of things is changing very rapidly to-day, and

precedents are taking their proper place in the system, The change is a wholly beneficial one; it is creating for international law an ampler stock of detailed rules, testing its abstract principles by their fitness to solve practical problems, and depriving it of the too academic character which has belonged to it in the past. No rule exists to determine the value of any particular precedent, and the decisions of national courts dealing with matters of international law may be helpful, as well as those of international courts; but the decisions of the International Court of Justice and of its predecessor the Permanent Court of International Justice are naturally entitled to more respect than any others.

(e) *Text-writers*

These again are a 'subsidiary means for the determination of rules of law'. The function of text-writers in the international system is in no way peculiar; it is a misapprehension to suppose that they have or claim any authority to make the law. Actually they render exactly the same services as in any other legal system. One of those services is to provide useful evidence of what the law is. This function is universally recognized, and it has been expressed by Mr. Justice Gray, delivering the judgement of the Supreme Court of the United States, in these words:

'International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their

determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators who by years of labour, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>1</sup>

Another function of text-writers is referred to by Mr. Justice Gray when he speaks of their 'speculations concerning what the law ought to be', for their writings may help to create opinion which may influence the conduct of states and thus indirectly in the course of time help to modify the actual law. Whether the speculations of any particular author are likely to have this active influence depends mainly on his prestige, and on the persuasiveness with which he presents his arguments. But it is important not to confuse these two functions, the providing of evidence of what the law is, and the exercise of influence on its development.

The notion that the position of international differs from that of other legal writers is perhaps due to two causes. The first is that in the past the influence of international writers as exponents of the law has not been brought into competition with the influence of judges. The second is that continental lawyers neither

<sup>1</sup> *Paquete Habana* (1899) American Prize Cases, p. 1938.

exalt the function of the judge, nor depreciate that of the text-writer, to the extent that the training of English lawyers leads them to do.

(f) *The place of 'reason' in the modern system*

In our discussion of natural law we saw that no system of law consists only of formulated rules, for these can never be sufficiently detailed or sufficiently foreseeing to provide for every situation that may call for a legal decision; those who administer law must meet new situations not precisely covered by a formulated rule by resorting to the principle which medieval writers would have called natural law, and which we generally call reason. Reason in this context does not mean the unassisted reasoning powers of any intelligent man, but a 'judicial' reason, which means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid, for example, the consideration of precedents, the finding of analogies, the disengagement from accidental circumstances of the principles underlying rules of law already established. This source of new rules is accepted as valid and is constantly resorted to in the practice of states, both in the decisions of international tribunals and in the legal arguments conducted by foreign offices with one another, so that a positivism which refuses to accept it is untrue to its own premisses. It is thus referred to in an interesting passage in an award of the Claims Tribunal which was set up by an agreement between the United States and Great Britain in 1910:



'Even assuming that there was . . . no treaty and no specific rule of international law formulated as the expression of a universally recognized rule governing the case . . . , it cannot be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find . . . the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.'<sup>1</sup>

The admission of this element in the judicial process is indeed inevitable if we are to avoid the untenable conclusion that international law contains lacunae or 'gaps' which may conceivably oblige a court, instead of declaring the rights of the parties on the facts before it, to pronounce a *non liquet*, that is to say, to declare that in default of any rule applicable to the case the point at issue 'is not clear' and therefore cannot be decided. Such a situation does not in fact arise in international, any more than it arises in municipal, litigation. It does not arise, because international law, like any other system of law, is, in a formal, though of course not in any other, sense a 'perfect' system; it can provide a solution for any issue sub-

<sup>1</sup> Case of the *Eastern Extension, etc. Telegraph Co. Ltd.* Nielsen's Report, p. 75, quoted in Cory, *Compulsory Arbitration*, p. 226.



mitted to a court, and it can do this because it accepts the practice by which the judge is required to 'find' a rule of law which is applicable to the case before him. Lord Mansfield, perhaps the greatest judge who ever sat on the English bench, doubtless had the same principle in mind when he wrote: 'The law of nations is founded on justice, equity, convenience, and *the reason of the thing*, and confirmed by long usage.'<sup>1</sup>

### § 5. *The Legal Character of International Law*

It has often been said that international law ought to be classified as a branch of ethics rather than of law. The question is partly one of words, because its solution will clearly depend on the definition of law, which we choose to adopt; in any case it does not affect the value of the subject one way or the other, though those who deny the legal character of international law often speak as though 'ethical' were a depreciatory epithet. But in fact it is both practically inconvenient and also contrary to the best juristic thought to deny its legal character. It is inconvenient because if international law is nothing but international morality, it is certainly not the whole of international morality, and it is difficult to see how we are to distinguish it from those other admittedly moral standards which we apply in forming our judgements on the conduct of states. Ordinary usage certainly uses two tests in judging the 'rightness' of a state's act, a moral test and one which is somehow

<sup>1</sup> For the occasion and reference see Pollock, *Essays in the Law*, p. 64.

felt to be independent of morality. Every state habitually commits acts of selfishness which are often gravely injurious to other states, and yet are not contrary to international law; but we do not on that account necessarily judge them to have been 'right'. It is confusing and pedantic to say that both these tests are moral. Moreover, it is the pedantry of the theorist and not of the practical man; for questions of international law are invariably treated as legal questions by the foreign offices which conduct our international business, and in the courts, national or international, before which they are brought; legal forms and methods are used in diplomatic controversies and in judicial and arbitral proceedings, and authorities and precedents are cited in argument as a matter of course.<sup>1</sup> It is significant too that when a breach of international law is alleged by one party to a controversy, the act impugned is practically never defended by claiming the right of private judgement, which would be the natural defence if the issue concerned the morality of the act, but always by attempting to prove that no rule has been violated. This was true of the defences put forward even for such palpable breaches of international law as the invasion of Belgium in 1914, or the bombardment of Corfu in 1923.

But if international law is not the same thing as international morality, and if in some important respects at least it certainly resembles law, why should we hesitate to accept its definitely legal character?

<sup>1</sup> Cf. Hall, *International Law*, 8th ed., p. 14.

The objection comes in the main from the followers of writers such as Hobbes and Austin, who regard nothing as law which is not the will of a political superior. But this is a misleading and inadequate analysis even of the law of a modern state; it cannot, for instance, unless we distort the facts so as to fit them into the definition, account for the existence of the English Common Law. In any case, even if such an analysis gave an adequate explanation of law in the modern state, it would require us to assume that that law is the only true law, and not merely law at a particular stage of growth or one species of a wider genus. Such an assumption is historically unsound. Most of the characteristics which differentiate international law from the law of the state and are often thought to throw doubt on its legal character, such, for instance, as its basis in custom, the fact that the submission of parties to the jurisdiction of courts is voluntary, the absence of regular processes either for creating or enforcing it, are familiar features of early legal systems; and it is only in quite modern times, when we have come to regard it as natural that the state should be constantly making new laws and enforcing existing ones, that to identify law with the will of the state has become even a plausible theory. If, as Sir Frederick Pollock<sup>1</sup> writes, and as probably most competent jurists would to-day agree, the only essential conditions for the existence of law are the existence of a political community, and the recognition by its members of settled rules binding upon

<sup>1</sup> *First Book of Jurisprudence*, p. 28.

them in that capacity, international law seems on the whole to satisfy these conditions.

§ 6. *Some Defects of the System*

But it is more important to understand the nature of the system than to argue whether it ought to be called law or something else. The best view is that international law is in fact just a system of customary law, upon which has been erected, almost entirely within the last two generations, a superstructure of 'conventional' or treaty-made law, and some of its chief defects are precisely those that the history of law teaches us to expect in a customary system. It is a common mistake to suppose that of these the most conspicuous is the frequency of its violation. Violations of law are rare in all customary systems, and they are so in international law. The explanation of that fact is simple, and so too is the explanation of the common belief to the contrary. For the law is normally observed because, as we shall see, the demands that it makes on states are generally not exacting, and on the whole states find it convenient to observe it; but this fact receives little notice because the interest of most people in international law is not in the ordinary routine of international legal business, but in the occasions, rare but generally sensational, on which it is flagrantly broken. Such breaches generally occur either when some great political issue has arisen between states, or in that part of the system which professes to regulate the conduct of war. But our diagnosis of what is wrong with the system

will be mistaken if we fail to realize that the laws of peace and the great majority of treaties are on the whole regularly observed in the daily intercourse of states. And this is no small service to international life, however far it may fall short of the ideal by which we rightly judge the achievements of the system. If we fail to understand this, we are likely to assume, as many people do, that all would be well with international law if we could devise a better system for enforcing it; but the weakness of international law lies deeper than any mere question of sanctions. It is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that makes it possible for a police force to be effectively organized. The imperative character of law is felt so strongly within a highly civilized state that national law has developed a machinery of enforcement which generally works smoothly, though never so smoothly as to make breaches impossible. If the imperative character of international law were equally strongly felt, the institution of definite international sanctions would easily follow.

A customary system of law can never be adequate to the needs of any but a primitive society, and the paradox of the international society is that, whilst on the material side it is far from primitive, and therefore needs a strong and fairly elaborate system of law for the regulation of the clashes to which the material interdependence of different states is constantly giving rise, its spiritual cohesion is, as we have already



seen, weak, and as long as that is so the weakness will inevitably be reflected in a weak and primitive system of law.

The two most serious shortcomings of the present system are the rudimentary character of the institutions which exist for the making and the application of the law, and the narrow restrictions on its range. The institutions which do exist will be described in the next chapter. But we may note here that there is no legislature to keep the law abreast of new needs in the international society; no executive power to enforce the law; and although certain administrative bodies have been created, these, though important in themselves, are far from being adequate for the mass of business which ought to be treated to-day as of international concern. There exist also convenient machinery for the arbitration of disputes and a standing court of justice, but the range of action of these is limited because resort to them is not compulsory.

The restricted range of international law is merely the counterpart of the wide freedom of independent action which states claim in virtue of their sovereignty, and, as we have seen, it is because the demands that international law makes on states are on the whole so light that its rules in general are fairly well observed. The system is still at what we may describe as the *laissez-faire* stage of legal development. The conduct of a state does not fall under international law merely because it may affect the interests of other states; this may be true and yet the



matter in question may fall within what is called the 'domestic jurisdiction' of a single state. For example, legislation restricting immigration is not a matter which affects the interests only of the countries of immigration; it creates serious difficulties for countries which have a surplus of population, and where economic life has come to depend on emigration facilities. This latter fact, however, is irrelevant from a legal point of view, for immigration, though it is only one side of a problem of great international concern, the problem of the migration of population, is a matter which international law leaves each country to determine for itself. Other illustrations of matters which at present international law leaves to 'domestic jurisdiction' are the manner in which a state chooses to treat its own subjects, its choice of a form of government, its naturalization laws, and yet its action on any of these matters may easily have repercussions on the interests of other states. An even more serious limitation on the range of international law is that practically the whole sphere of international economic relations, except where mutual concessions have been arranged by treaty, belongs to domestic jurisdiction. Tariffs, bounties, preferences, raw materials, markets and the like are matters which often underlie the rivalries of modern states and provide the causes, if not the occasions, of their disputes; yet international law can very rarely interpose its regulating influence here. Law will never play a really effective part in international relations until it can annex to its own sphere some of the matters which at present lie

within the 'domestic jurisdictions' of the several states; for so long as it has to be admitted that one state may have its reasonable interests injuriously affected by the unreasonable action of another, and yet have no legal basis for complaint, it is likely that the injured state, if it is strong enough, will seek by other means the redress that the law cannot afford it. At the best the present state of things leads to the maintenance by powerful states of policies outside the law, conceived in their own interests, and paying only so much regard to the interests of the other states as prudence dictates. As things are, such policies cannot even be wholly condemned, because the interests which they protect are often perfectly reasonable interests such as a really adequate system of law would recognize and safeguard; but, unfortunately, there is at present no security that these policies will be confined to the protection of the *reasonable* interests of the states concerned.

It is a natural consequence of the absence of authoritative law-declaring machinery that many of the principles of international law are uncertain. But on the whole the layman tends to exaggerate this defect. It is not in the nature of any law to provide mathematically certain solutions of problems which may be presented to it; for uncertainty cannot be eliminated from law so long as the possible conjunctions of facts remain infinitely various. The difference between international law and the law of a state in this respect is therefore one of degree and not of kind, and it tends to be reduced as the practice of resorting

to international courts, which are able to work out the detailed practical implication of general principles, becomes more common. The difficulty of formulating the rules of international law with precision is a necessary consequence of the kinds of evidence upon which we have to rely in order to establish them.

§ 7. *The Application of International Law in British Courts*<sup>1</sup>

The accepted doctrine is that international law is part of our law, and one practical consequence of this, which has been called the doctrine of 'Incorporation', is that international law for a British court is not a foreign law. When our courts have to deal with an issue which depends on a rule of foreign law, the rule has to be proved as a fact by evidence like any other fact, but as international law is part of the law of the land the courts will take judicial notice of it.

The earliest recorded judicial statement of the doctrine of incorporation is a dictum of Lord Chancellor Talbot in *Barbuit's Case*<sup>2</sup> in 1735, where he is reported to have said 'the law of nations in its fullest extent is and forms part of the law of England'. But there is nothing in the report to suggest that the Lord Chancellor thought that he was introducing a new principle; he seems to have been merely stating one that was already well established in the law. Probably for the origin of the doctrine we must remind our-

<sup>1</sup> See the articles of Professor Dickinson in *A.J.I.L.*, vol. xxvi. 239, and of Professor Lauterpacht in *Grotius Society Transactions*, 1939, p. 52.

<sup>2</sup> *Cas. t. Talbot*, 281.

selves of the original conception of international law as simply the law of nature applied to the relations between sovereign princes, and of the fact that the Common law too professed to be an embodiment of reason. It was natural therefore that judges should think of the two kinds of law not as two unrelated systems, but as the application to different subject-matters of different parts of one great system of law. However that may be, the doctrine survived after natural law theories of the basis of international law had ceased to be fashionable in the nineteenth century, and were succeeded by the positivist view that the law is founded on the consent of states express or implied; the only change was that the doctrine was given a somewhat different formulation. It was formulated by Lord Chief Justice Alverstone in 1905 in the case *West Rand Mining Co. v. The King*<sup>1</sup> in these terms: 'Whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.' A still more recent statement to the same effect is one by Lord Atkin delivering the advice of the Privy Council in *Chung Chi Chiung v. The King*:<sup>2</sup> 'The courts acknowledge the existence of a body of rules which nations

<sup>1</sup> [1905] 2 K.B. 391.

<sup>2</sup> [1939] A.C. 160.

accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law.'

The doctrine then has been established in our law for at least 200 years, but it is necessary to ask how far it does in fact represent the practice of our courts. On that question there are certain qualifications which we shall have to admit.

One of these is that under our Constitution an Act of Parliament is paramount; international law is part of the common law, and in a British court any rule of the common law must yield before an Act of Parliament. The point arose in 1906 in the Scottish case of *Mortensen v. Peters*,<sup>1</sup> where the appellant, a Danish national, had been fined for trawling in the Moray Firth outside the three-mile limit under an Act which made it an offence for 'any person' to trawl in those waters. It was argued that Parliament could not have intended those words to apply to a foreigner, but the High Court of Justiciary said that the question was purely one of construction, and they refused to accept the construction contended for by the appellant.

'In this Court', said Lord Dunedin, 'we have nothing to do with the question whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament is

<sup>1</sup> 14 S.L.R. 227.



supreme, and we are bound to follow its terms. . . . It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom to which appeal may be made. . . . International law, so far as this court is concerned is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland.'

An American court used similar language in the case of *Over the Top* in 1925:<sup>1</sup> 'International practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of Congress.' There is, however, a presumption that neither Parliament nor Congress will intend to violate international law, and a statute will not be interpreted as doing so if that conclusion can be avoided. In *Mortensen v. Peters* the Court was not satisfied that the offence alleged had been committed outside Scottish territorial waters, and it is believed that there is no case in the English reports in which a court has felt bound by a statute to override a rule of international law.

A second qualification of the doctrine of incorporation is that a treaty, though internationally binding, does not thereby alone become part of the law of the land under our Constitution. The making of treaties is a prerogative power which the executive may exercise without the concurrence of the legislature, so that if a treaty were *ipso facto* to become part of our domestic law it would mean that the executive could legislate for the country. Under the American Con-

<sup>1</sup> 5 Federal Reporter, 838.



stitution the rule is different, for a treaty is 'the supreme law of the land . . . anything in the constitution or laws of any State notwithstanding'; but the American Constitution associates one House of the legislature, the Senate, with the executive, the President, in the making of treaties. *Walker v. Baird*<sup>1</sup> illustrates the British rule. The commander of a naval vessel, acting under orders to enforce a convention with France for regulating the lobster fisheries off Newfoundland, had seized certain lobster factories of the plaintiff, but it was held that this did not excuse the invasion of private rights. There are possibly some exceptional cases in which the Crown, without legislative confirmation, can make treaties which will bind individuals and affect their rights, but the general rule is clear. In practice the Cabinet system, by ensuring that our executive and legislature will work together, normally prevents any conflict between our treaty obligations and the law of the land from arising.

A third qualification arises from the practice of our courts in accepting information from the executive, instead of taking evidence in the ordinary way, on matters which they regard as falling within the executive sphere. In such cases the responsibility for ensuring that the court's decision conforms to international law rests with the executive and not with the court. For example, if the executive informs the court that we have recognized Barataria as an independent state, or that such and such persons

<sup>1</sup> [1892] A.C. 491.

constitute its government, the court will not inquire whether Barataria does or does not satisfy the international requirements of a state, or whether the persons designated are really acting as a government. The doctrine of 'act of state' also may have the effect of precluding the courts from judging in accordance with what they believe to be the rules of international law, for by that doctrine an alien, resident abroad, who has been injured by some act authorized or adopted by the Crown, has no remedy in our courts; his remedy, if any, is by diplomatic action taken by his own government. As was said in the House of Lords in the case of *Johnstone v. Pedlar*,<sup>1</sup> 'What the Crown does to foreigners by its agents is state action . . . beyond the scope of domestic jurisdiction.'

A fourth qualification of the doctrine of incorporation is one that no national court can avoid. It is that a national court can only apply its own version of what the rule of international law is, and that however objectively it may try to approach a question which raises an issue of international law, its views will inevitably be influenced by national factors. The Scottish Court case put this very frankly in the passage from *Mortensen v. Peters* which has been quoted above, and it is interesting to contrast that passage with one from the judgement of Lord Stowell in the case of *The Maria*.<sup>2</sup>

'The seat of judicial authority', he said, 'is indeed locally here . . . but the law itself has no locality. . . . It is the duty of the person who sits here to determine this

<sup>1</sup> [1921] 2 A.C. 262.

<sup>2</sup> 1 C. Rob. 340.

question exactly as he would determine the same question if sitting in Stockholm. . . . If I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question.'

But when we remember that the question upon which Lord Stowell was deciding concerned the resistance to visit and search by a British warship on the part of a Swedish ship sailing under convoy, and that the right of convoy was one on which the British and Swedish views were at that time diametrically opposed, it is hard to believe that Lord Stowell really thought that a Swedish judge, sitting in Stockholm, would have been likely to decide the case in the way in which he proposed to decide it himself. The English doctrine of precedents also has to some extent the effect of obscuring for an English court the fact that international law, being a customary law, is developed by agencies which include, but are not limited to, the English courts. For our courts hold themselves bound to apply our rules about the force of precedents to questions of international law in exactly the same way as they apply them to questions of domestic law, and if there is an English precedent available, no amount of foreign authority will displace it. Our courts sometimes seem to the lawyers of other countries to be applying purely English law when they themselves profess to be applying international law, and Lord Stowell may have had criticisms of this kind in mind when in *The Recovery*,<sup>1</sup>

<sup>1</sup> 6 C. Rob. 341.

after saying that his court was a court of the law of nations and that it belonged to other nations as well as to our own, he continued:

'What foreigners have a right to demand from it is the administration of the law of nations simply, and exclusively of the introduction of principles borrowed from our municipal jurisprudence, to which, it is well known, they have at all times expressed no inconsiderable repugnance.'

Professor Dickinson has summed up the doctrine of incorporation in its modern form in these words:

'It is the modern Anglo-American doctrine that the national rule on a question of international concern shall be derived, in the absence of a controlling statute, executive decision, or judicial precedent, from relevant principles of international law to which the nation has given its implied or express consent. The rule thus derived is none the less a rule of national law because it is derived from an international source. Nor does the reference to the nation's implied or express consent state one of the doctrine's essential elements. It merely acknowledges the prevailing positivist theory which founds international law upon consent. When the positivist theory has been supplanted by another theory, the reference to consent may disappear. As it is actually applied therefore the Anglo-American doctrine of incorporation is fundamentally sound.'

It is also a beneficial doctrine, both because our courts regard international law as authoritative in its own right, and also because by asserting that it is part of the law of the land we deny that it has any specific quality which distinguishes it from that law.

### III

## THE LEGAL ORGANIZATION OF INTERNATIONAL SOCIETY

### § 1. *The Beginnings of International Constitutional Law*

UNTIL very modern times government has been regarded as a purely national function, and intercourse between states has taken place through national officials. This is still the general rule. Every state, for example, has a department of the national government corresponding to the Foreign Office; and the foreign offices of the world are linked together by the practice of 'legation', or sending of representatives to other states. Since the sixteenth century the practice of maintaining standing legations in other countries has been general, but envoys are still sometimes sent for special purposes as well. A diplomatic agent abroad is appointed by 'letters of credence' from his own government, and these he presents to the head of the government to which he is 'accredited'. A state may decline to receive any particular representative, may ask for his recall, or even dismiss him; but any of these is a serious step which should not be taken except for good reason. This, however, and most of the other matters relating to diplomacy, with the exception of the immunities<sup>1</sup> to which diplomatic persons are

<sup>1</sup> *Infra*, p. 194.



entitled by international law, belong to the sphere of international comity rather than to law.

But diplomacy of this kind is only an instrument for conducting the business of one state with another, and not for conducting *general* international business in which a number of states have an interest. This latter kind of business has vastly increased in extent and importance in modern times, and states have had to recognize that in many departments of government none of them can serve the interests of its own people in the best way unless it arranges to co-ordinate its action with that of other states. This development began about the middle of the nineteenth century, and it has led to the development of institutions which, while they cannot yet be regarded as giving a 'constitution' to the international society, may not unfairly be described as a beginning of its constitutional law.

These institutions operate by organizing co-operation between the national governments and not by superseding or dictating to them, and they are, therefore, probably not so much the beginnings of an international 'government', though the term is often convenient, as a substitute for one. Their consideration, however, invites the same questions as those which arise in the study of any other legal system, and it is proper to ask how far and in what manner they perform for international law the functions which governmental institutions perform for the law of a state, that is to say, the functions of legislation, of execution and administration, and of judicature.

§ 2. *International Legislation*

An international legislature, in the sense of a body having power to enact new international law binding on the states of the world or on their peoples, does not exist. The very notion that international law requires any deliberate amendment is, indeed, quite a modern one. The international community has been content to rely for the development of its law on the slow growth of custom, and perhaps the first recognition of the need of any consciously constructive process in building up the law was the declaration by the Congress of Paris in 1814 in favour of freedom of navigation on international rivers. This declaration was not very effective, but it was important as showing that, in the conference the international community had obtained a sort of rudimentary legislative organ. Little use, however, was made of conferences for this purpose until the latter half of the nineteenth century, but after the Conference of Paris in 1856, at which a famous Declaration dealing with the laws of maritime warfare was agreed to, quasi-legislation by conference became fairly frequent.

The movement took different forms. In part it was inspired by the humane desire to mitigate the horrors of war; examples of this are the Geneva Conventions of 1864, 1906, and 1929, for ameliorating the condition of the sick and wounded, and most of the Hague Conventions of 1899 and 1907. It took another form in the foundation of the international administrative system which is referred to in the next

section. Lastly, conferences have often been used for the settlement of *special* political questions by action which is really legislative in character, although it generally preserves the forms of mere mediation between supposedly sovereign states. Instances are, the Conference of London which established the independence of Belgium in 1831; the Conference of London which established that of Luxemburg in 1867; the Congress of Berlin, 1878, which dealt with the affairs of Turkey and the Balkan States; the Conference of Algeciras which dealt with Morocco in 1906. On these and other occasions states, or more often the Great Powers, have asserted a right to decide, by their collective action, questions in which they all felt themselves to be interested, without much regard to the alleged rules of international law concerning intervention, which are based upon a theory of the independence of every sovereign state which is liable to be disregarded in an international crisis. There is no doubt that the conference used in this way has frequently been the means of preventing wars.

The process of changing the law by means of conventions reached at international conferences has obvious disadvantages if we compare it with the work of an ordinary legislative body. The conference is not a continuous body; it meets for some special purpose and then dissolves. The conventions at which it arrives have no binding force over states which do not accept them, and unfortunately states, through apathy, through the pressure of some domestic

interest, or for some other reason, often fail to ratify even those conventions which their representatives have signed. But more serious than the difficulties which arise from the defective nature of international legislative machinery is the psychological difficulty of mobilizing public opinion behind proposals for international legislation. Only a small minority of the people of any country are continuously interested in international affairs, and the domestic claims upon the time and energies of statesmen are so numerous that they are not easily induced to take up proposals of reform for which there is no very insistent demand. Almost any proposal for international change by agreement involves some sacrifice or apparent sacrifice of national interest, and in the general ignorance of the issues at stake the sacrifice is easily made to appear greater than the compensating advantage. But despite all these difficulties the volume of international legislation is already considerable. A recent writer<sup>1</sup> has estimated that during the half-century 1864-1914, 257 international conventions of a legislative kind were entered into, and that during the years 1919-29, that is to say, in the first eleven years after the foundation of the League of Nations, there were no less than 229. These figures naturally include, as does the statute book of any legislature, many instruments not in themselves very important, but they are significant of a promising change in the management of international affairs.

<sup>1</sup> Professor Manley O. Hudson in *International Legislation*, vol. i, p. xxxvi.

The formation of the League of Nations greatly stimulated the practice of international legislation. In pre-League days, when a matter was thought to call for international regulation, it had to be taken up as a piece of business unrelated to other matters of a similar kind; a special conference would be summoned through the slow-moving channels of diplomacy, a secretariat improvised, and perhaps a special organ created to give effect to the decisions of the conference after it had broken up. The League provided a permanent organization which could be used for taking up any matter which states had decided to regulate internationally, which could collect the relevant information on which to base an agreement, and could supervise the working of an agreement if one should be concluded. In this aspect of its work the League was simply a standing conference system, and for no idealistic reasons but merely as a matter of practical convenience the modern world can hardly conduct its international relations without such a system. Not only are there many functions which states cannot perform efficiently unless they act together—one of the most obvious is the control of disease, of which the germs recognize no frontiers—but even their more intimately domestic policies, especially in economic matters, have become more and more dependent for their success on some assurance that other nations will not adopt policies which will defeat their objects. In short, the field of action within which any one state can work out its socially desirable purposes without taking account of what



other states are doing, or are likely to do, is for various reasons contracting. New technological developments in industry and transport are making the economy of every country, even of the greatest and most nearly self-sufficing, ever more sensitive to what happens in other countries. A change, too, in our ideas of the proper functions of government has greatly increased the sphere of state activity at the expense of that of private individuals, and this has converted much international business which was formerly only the concern of private individuals into business which has to be the subject of negotiations between governments.

This growing modern interdependence of states makes the problem of developing international law more urgent, but unfortunately it does not necessarily make it easier. When the ideological differences between states are as deep as they are to-day, the frequent and public contacts between states which follow from the provision of institutions for encouraging their collaboration may have exactly the opposite effect. Such institutions, as Soviet Russia has made only too clear, offer a convenient sounding-board for virulent and continuous invective, and may therefore only serve to aggravate an already dangerous situation. When states do not even share in a common desire to work together, it might be better that for the time being they should cease to go through the motions of co-operation.

§ 3. *The Executive and Administrative Functions*

The international system has no central organ for the enforcement of international legal rights as such, and the creation of any such general scheme of sanctions is for the present a very distant prospect. But the most urgent part of the problem of enforcement is the subjection to law of the use of force by states, and in modern times two notable experiments, in the Covenant of the League of Nations and the Charter of the United Nations, have been made with this end in view. These two experiments have followed different lines. The system of the Covenant relied on the fulfilment by the members of undertakings which they had severally given to take certain prescribed measures against an aggressor, but it did not set up a supra-national authority; the organs of the League could be used for co-ordinating the actions of the individual members, but they could not issue directions as to the action these members were to take. On the other hand the Charter has created for the first time an authority which, at least according to the letter of its constitution, is to exercise a power of this supra-national kind, though how far the Charter has made that power effective is a question which it will be necessary to examine later.<sup>1</sup>

This absence of an executive power means that each state remains free, subject to the limitations on the use of force to be discussed later,<sup>2</sup> to take such

<sup>1</sup> *Infra*, p. 276 et seq.

<sup>2</sup> *Infra*, Ch. IX.

action as it thinks fit to enforce its own rights. This does not mean that international law has no sanctions, if that word is used in its proper sense of means for securing the observance of the law; but it is true that the sanctions which it possesses are not systematic or centrally directed, and that accordingly they are precarious in their operation. This lack of system is obviously unsatisfactory, particularly to those states which are less able than others to assert their own rights effectively.

But the difficulties of introducing any radical change in the present means of enforcing international law are extremely formidable. The problem has little analogy with that of the enforcement of law within the state, and the popular use of such phrases as an 'international police force' tends to make it appear much simpler than it really is. Police action suggests the bringing to bear of the overwhelming force of the community against a comparatively feeble individual law-breaker, but no action of that sort is possible in the international sphere, where the potential law-breakers are states, and the preponderance of force may even be on the law-breaking side. Even in a federation, as the experience of the United States has shown, the problem of enforcing the law against a member state has not been easy to solve.

The administrative function, like the executive, is not provided in the international system with any centralized organ, but in the latter half of the nineteenth century a number of separate institutions with specialized administrative functions were created.

They arose not from any idealistic theory of international relations, but from the compelling force of circumstances; in one department of administration after another experience showed that government could not be even reasonably efficient if it continued to be organized on a purely national basis. These institutions are known as 'public international unions'. The first such union was the International Telegraphic Union formed in 1865; others are the Universal Postal Union of 1874, the International Institute of Agriculture of 1905, the Radio-telegraphic Union of 1906. These unions differ in their constitution, but the Postal Union is the most successful example of the type. This was not achieved until efforts to carry on foreign postal services by a number of separate treaties between pairs of states had revealed the hopeless inefficiency, from a business point of view, of adhering to theories of independence in such a matter as postage, and it was resisted in almost every country, both as an infringement of sovereignty and as involving an abandonment of the principle by which every state, as far as it can, tries to 'make the foreigner pay' the expenses of its government. It consists of a Congress which meets at intervals, in which each state, including some colonies of the larger states, has one vote. The Congress has power to alter the rules of the Union by a majority vote, and although alterations have to be ratified by the governments, ratification has become a formality, since a refusal to ratify would involve leaving the Union, and no state can afford to do that. Besides the

Congress, the Union has a permanent Bureau at Bern, which, amongst other functions, collects and distributes information, and acts as a clearing-house for settling accounts. In the intervals between Congresses, the Bureau may receive proposals for altering the rules of the Union; it then proceeds to collect the votes of the states upon them, and the alteration may take effect without any meeting.

A less advanced type of the Public International Union is seen in the Copyright Union, formed in 1886, under which the rights of authors, composers, and others in their works are protected in foreign countries. This has a permanent Bureau at Bern, but no governing Congress; it operates under conventions which are revised from time to time by specially summoned conferences of states. There are also many instances in which the modern movement towards international co-operation in the field of administration has taken the form not of creating an international organ, but of an agreement to co-ordinate national laws or to introduce uniform methods into the national administration, for example, a Convention for the protection of submarine cables of 1884, the Automobile Convention of 1904, and a Convention of 1910 for the suppression of the White Slave Traffic.

These are a few out of the many experiments in international administrative co-operation which have been made in the last two generations under the impulse of difficulties which were incapable of being solved by methods of government organized on the traditional theory that each state is a sovereign and



separate unit. States are no longer separate units in such matters as commerce, labour, art, morals, inventions, health; and slowly and as yet very imperfectly they are being compelled to recognize that they cannot be altogether separate units in the political or economic fields. The creation of the League of Nations in 1919 was therefore not the introduction of a wholly new principle into international life, but the logical outcome of a movement which had been gathering force for many years.

§ 4. *The League and the United Nations*

The Covenant defined the objects of the League as being 'to promote international co-operation and to achieve international peace and security'. The Charter contains a statement of 'Purposes and Principles' which goes into greater detail than the Covenant, but these are also in substance the objects of the United Nations. In fact in this matter the architects of any international organization which is to be general in its scope have no real choice; peace, and co-operation between nations for the promotion of peace and for other purposes are the two great objectives at which they are bound to aim. Inevitably, therefore, the similarities between the League and the United Nations are many and fundamental. But there are important differences too, for the Charter was intended to correct certain defects, or what were believed to be defects, in the Covenant, and it is easier to assess the value of the Charter if it is examined against the background of the Covenant.

The League has ceased to exist, but it has left a legacy of experience which the student of international relations cannot afford to neglect.

The principle on which the League was founded was simple and consistent. It was an association of independent but co-operating states, and its institutions were intended as means for making it as easy as possible for these states to work together. The members retained their sovereignty, but they had all agreed to do and not to do certain things in the exercise of their sovereign rights. Thus the Covenant did not contain even the beginnings of a system of international government in the strict sense of that word. 'The League' was hardly more than a name for describing the members collectively; it was not an organic union, and there was hardly anything that it could do in a corporate capacity. Throughout the Covenant it was not 'the League', but the 'members of the League', that were to act in certain ways, and everything depended upon their being ready and able to fulfil the obligations which they had undertaken. An institution constituted on these lines was bound to be, as a body, weak, and though there were political motives which made the substitution of the United Nations for the League inevitable, it was also hoped that by shaping the United Nations on different lines this weakness might be corrected.

A necessary corollary of the co-operative principle on which the League was founded was the so-called 'rule of unanimity'; in general, decisions of the

Assembly or the Council of the League required the agreement of all the members represented at a meeting. There were certain exceptions to this rule, especially one providing that when the Council was reporting on a dispute and making recommendations for its settlement the votes of parties to the dispute were not to be counted. But, apart from the exceptions, it is a mistake to suppose that the rule of unanimity was bound to paralyse, or that in fact it did paralyse, the working of the League; it did not have that effect because successful working did not depend on the ability of the organs of the League to reach decisions, but, as has just been mentioned, almost entirely on the willingness of the members severally to fulfil the obligations which they had undertaken in the Covenant. The real effect of the rule was to make it impossible for a majority of other states to increase or vary a state's obligations without its own consent, in short to safeguard the co-operative basis of their association; it did not confer on a dissenting state a right to veto the action of the others.

The principal organs of the League were the Assembly, consisting of representatives of all the members, the Council, with the Great Powers as permanent members and others, eleven in number in the last days of the League, elected by the Assembly, and the Secretariat. The Covenant allotted a few functions to the Assembly and a few others to the Council, but generally it did not differentiate between the functions of these two bodies; either of them could deal with any matter within the sphere of

action of the League or affecting the peace of the world'. It thus left them free to adjust their relations in the light of experience, and that is what they did. The Council, being a smaller body and meeting more frequently, was better able to act in an emergency; it came to be regarded as a sort of executive committee of the Assembly, working out the details and supervising the administration of policies which the latter had adopted in general terms. The arrangement illustrates a quality which characterized the whole Covenant. Its authors realized that they were launching an untried experiment, and they refrained from cramping its future development by too precise and detailed prescriptions of the powers and duties of the League; they were content to give it the bare outlines of the constitution which it needed for a start on its career. In this respect the Charter, which has 111 articles against the 26 of the Covenant, provides a striking contrast, and its attempt to provide for all contingencies has already led to frequent legalistic debates such as rarely arose under the Covenant.

The United Nations has six principal organs, the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council,<sup>1</sup> the International Court of Justice,<sup>2</sup> and the Secretariat. The Charter distinguishes between the functions of the General Assembly and the Security Council by placing on the latter the 'primary responsibility' for the maintenance of peace, and precluding the former, whose functions in other respects

<sup>1</sup> *Infra*, p. 153.

<sup>2</sup> *Infra*, p. 255.

are very wide and general, from dealing with that subject in a way that might embarrass the Security Council. But the effect of this differentiation is in some respects unfortunate; it separates matters which are not intrinsically separable, for those that are given to the General Assembly, social and economic matters, for example, are often the underlying causes of the frictions which endanger international peace; and by limiting the Security Council to questions of security it leaves that body with little work of a constructive character, and so makes more difficult the growth of a feeling of corporate responsibility among the members like that which developed and proved of great value in the Council of the League.

- The specific functions of the General Assembly, which consists of all the members of the Organization, are to discuss any matter within the scope of the Charter and to make recommendations thereon either to the members of the United Nations or to the Security Council or to both, but this is subject to the proviso that it must refer to the Security Council any question relating to international peace on which action is necessary, and that it may not make any recommendation on a dispute or situation which is being dealt with by the Security Council. The General Assembly also approves the budget of the Organization and apportions the expenses among the members. It takes its ordinary decisions by a majority vote, but if a question is 'important' a two-thirds majority of the members present and voting is required, and there is a list of these 'important'



questions which includes amongst others the election of the non-permanent members of the Security Council, the admission, suspension, and expulsion of members, the budget, and any other question which by a bare majority the General Assembly decides ought to be considered as 'important'. The introduction of majority voting is a departure from the usual practice of international bodies, including that of the League, but here the innovation has not the vital importance that we shall see it has in the constitution of the Security Council. That is because, apart from its control over the budget, all that the General Assembly can do is to discuss and recommend and initiate studies and consider reports from other bodies. It cannot *act* on behalf of all the members, as the Security Council does, and its decisions are not directions telling the member states what they are or are not to do. In principle its functions are similar to those of the Assembly of the League, and like that body it must rely on co-operation among the members and not on power, for it has no powers.

The Security Council consists of five permanent members—China, France, the U.S.S.R., the United Kingdom, and the United States, and six other members elected by the General Assembly for a term of two years. Its functions are laid down in Article 24 of the Charter in these terms:

'In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of

international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.'

The Charter then refers to certain 'specific powers' granted to the Security Council to enable it to discharge its duties; most of these relate to its action in the pacific settlement of disputes and with respect to threats to the peace, and it will be necessary to return to these later.<sup>1</sup> Article 25 then provides that

'The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

It is clear that these provisions confer on the Security Council powers which far exceed those possessed by any of the organs of the League, or by any of the other organs of the United Nations. They are powers greater than have ever before been exercised by any international body, and they constitute the most far-reaching of the innovations which the Charter has introduced into international organization.

It was impossible, however, to give this binding effect to the Security Council's decisions without making the method by which its decisions were to be reached a matter of crucial importance, and it soon appeared that the Great Powers or at least some of them would not consent to be bound by decisions

<sup>1</sup> *Infra*, p. 277.

which were arrived at without their concurrence. They refused to accept a system of voting under which they might be outvoted, and in the system which was eventually accepted and embodied in the Charter they insisted on a privileged position. Decisions of the Security Council require the affirmative votes of seven members, but these seven votes must include the concurring votes of all the five permanent members. Consequently each of the five Great Powers has a veto on decisions, and despite the apparently vast extent of the powers of the Security Council, this veto has always to be borne in mind in estimating their real significance.

There are two exceptions to this rule of voting, but both are largely illusory; they are that decisions on matters of procedure may be made by the votes of *any* seven members, and that when a member is a party to a dispute which the Security Council is investigating that member must abstain from voting. But procedural matters are naturally the less important matters, and moreover the question whether a particular matter is or is not procedural is not itself a question of procedure, and apparently a permanent member can use its veto on that preliminary question. Then again there can naturally only be a 'party to a dispute' if a 'dispute' exists, and the question whether there is or is not a dispute is one on which the veto can be used. There is also a distinction in the Charter between a 'dispute' and 'a situation which might lead to international friction and give rise to a dispute', and when the Security Council is investigating a,

'situation', there is nothing to prevent a permanent member, however deeply it may be involved, from using the veto.

The veto is the price that the United Nations has paid in order to obtain an organ which should have power to decide and act in a corporate capacity, and it is already clear that the price has been a high one. So long as we are considering principles of political organization in the abstract, a body that has power to act on behalf of all the members of an organization is more likely, other things being equal, to ensure, as the Charter says, 'prompt and effective action' than one which, like the organs of the League or the General Assembly of the United Nations, can only *recommend* the members to act in a certain way. Certainly if we want an organization to be strong, it is a right instinct which leads us to prefer an organic rather than a merely co-operative basis for it. But abstract principles in politics are dangerous guides. No political institution can work unless it is adapted to the special conditions of its society, and it is no more possible to conjure away the weaknesses of the present loose society of independent states by endowing it with institutions appropriate to a society of a more advanced type than it is to turn a nation into a democracy by giving it a democratic constitution. The founders of the United Nations seem to have assumed that the reason why the League had not been strong enough for its task was that the Covenant had based it on a wrong principle; it was essential, they thought, to have an organization which could

act as a corporate body. If so, this was to misunderstand the cause of the League's weakness; it was not the Covenant that made it weak, but the frailty of the bonds that hold the society of states together, and the Covenant merely reflected this unfortunate fact. The hasty pursuit of a perfectionist policy has landed us in a cul-de-sac.

The moral of the veto is that international institutions cannot be raised from the co-operative to the organic level until we have a society of states which is far more closely bound together than are the states of to-day, until in short nations have the same sort of confidence in one another's intentions and policies and the same absence of fundamental diversity of interests that the states of a federation must have if their union is to endure. For in the world as it is to-day the insistence of the Great Powers on their veto cannot be considered as altogether unreasonable. The fact that Soviet Russia habitually uses it to prevent the Security Council reaching any decision of which it does not approve even though the decision affects no important Soviet interest does not make the veto itself unreasonable. As the British official commentary on the Charter says,<sup>1</sup> 'power should be commensurate with responsibility, and it is on the Great Powers that the Charter places the main responsibility'. It is not unreasonable, therefore, that when a decision of the Security Council may have major political consequences, especially when it may require enforcement measures to give it

<sup>1</sup> Cmd. 6666, p. 16.



effect—and it was probably assumed that only in such cases would the veto actually be used—the Great Powers should refuse to allow this burden to be thrust upon them by some majority of less interested smaller powers. The fault lies not in the veto, but in the powers that the Charter has given to the decisions of the Security Council; if its decisions were to have the effect that the Charter gives them, the veto was not only inevitable but reasonable. But it seems probable that the result of insisting that only a body that had power to make binding decisions could act effectively has been to give us a body that can neither decide nor act.

The Economic and Social Council consists of eighteen members elected by the General Assembly, and it is virtually a committee of that body. Its functions are the promotion of economic and social progress, of international cultural and educational co-operation, and of respect for human rights and fundamental freedoms. It initiates studies in these fields, and makes recommendations on them to the General Assembly, to the members of the United Nations, or to one of the 'specialized agencies', and it may also itself prepare draft conventions and call international conferences on matters within its competence. These 'specialized agencies' are organizations established by inter-governmental agreements in the economic, social, cultural, educational, health, and related fields; they include, amongst others, the International Labour Organization (I.L.O.), the Food and Agriculture Organization (F.A.O.), the

United Nations Educational, Scientific, and Cultural Organization (Unesco).

The Secretariat is practically an international civil service, and it is as necessary to effective international co-operation as a national civil service is to a national government. Its head is the Secretary-General, appointed by the General Assembly on the recommendation of the Security Council. He may bring before the Security Council any matter which he thinks may threaten the maintenance of peace, and neither he nor any member of his staff may seek or receive instructions from any government or from any authority outside the United Nations. The members, too, for their part, have undertaken to respect the international character of the Secretariat and not to influence its members in the discharge of their functions.

New members are admitted to the United Nations by the General Assembly upon the recommendation of the Security Council. A member against which preventive or enforcement action has been taken by the Security Council may be suspended, and a member which has persistently violated the principles of the Charter may be expelled, by the same process. The Charter can be amended by a two-thirds vote in the General Assembly, but this majority must include all the permanent members of the Security Council. It follows that a decision on any of these questions can be prevented by the veto of any one permanent member.

### § 5. *The International Labour Organization*

The International Labour Organization is now one of the 'specialized agencies' referred to in the Charter of the United Nations. It was formerly an autonomous body which had been founded by the peace treaties of 1919, but it was linked to the League in certain ways; for example, members of the League as such were members of the Organization, though non-members of the League might also belong to it, and the League provided for the budget of the Organization. It consists of (1) a General Conference of representatives, meeting at least once a year; and (2) a permanent Labour Office.

The Conference is composed of four members from each state, two being government delegates, and two non-government delegates representing employers and workpeople respectively. The latter are nominated by their governments, but they must be chosen in agreement with the industrial organizations which are most representative of employers and workpeople in the respective countries; and the Conference may refuse to admit a delegate whom it deems not to have been nominated in accordance with this provision. The delegates vote individually, the non-government having equal rights with the government delegates. This is a point of great interest to the theory of international relations; for the General Conference is a tentative recognition of the fact, which has long been apparent in every international sphere except the political, that interests of international concern

do not necessarily follow, but often cross, the boundary lines of territorial states. Obviously, however, its constitution was framed on the assumption that the industrial organizations represented would be independent of their own governments, and for totalitarian states therefore the different categories of members have no meaning.

Decisions of the Conference are either draft Conventions, or Recommendations for national legislation. Either of these requires a two-thirds majority for adoption, and although states are not bound to ratify a convention or to accept a recommendation, they must bring them before whatever authority in their respective countries is competent to deal with them by ratification or legislation or otherwise. It should be noted that this so-called 'ratification' differs from the ordinary ratification of a treaty which has been negotiated and signed by plenipotentiaries.<sup>1</sup> The draftsmen of a Labour convention are not representatives of states, but the members of the General Conference; there is no stage of signature as in ordinary treaties, and the choice before the states is between acceptance or rejection of the draft as the Conference frames it. Reservations would violate the rights of the non-governmental members of the Conference and are therefore inadmissible. States must make an annual report on the measures which they take to give effect to conventions which they have ratified, and associations of employers or workers may make representations to the Labour Office of

<sup>1</sup> *Infra*, p. 231.

the failure of a state to observe a convention, and the Governing Body of the Office may ask the state to reply to the complaint and may publish the representation and the reply if any. If such a complaint is made by another state, the Governing Body may refer it to a Commission of Inquiry constituted out of a standing panel of employers, workers, and independent persons, which prepares a report and recommendations on the matter; the state affected may appeal against the recommendation to the International Court of Justice, whose decision on the matter is final.

The Labour Office, which is the secretariat of the Organization, is controlled by a Governing Body of thirty-two persons, sixteen representing governments, eight elected by the employers' and eight by the workers' delegates to the Conference. Each of the eight countries of 'chief industrial importance'<sup>1</sup> nominates one of the governmental representatives, and the other eight are chosen from other states. Its functions are to collect and distribute information on all subjects relating to the international adjustment of industrial life and labour, to examine subjects which it is proposed to bring before the Conference, and to conduct such special investigations as the Conference may order.

<sup>1</sup> At present these countries are Brazil, Canada, China, France, India, Italy, the United Kingdom, and the United States.



## IV STATES

### § 1. *General Notion of States in International Law*

A STATE is an *institution*, that is to say, it is a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on. Modern states are territorial; their governments exercise control over persons and things within their frontiers, and to-day the whole of the habitable world is divided between rather more than sixty of these territorial states. A state should not be confused with the whole community of persons living on its territory; it is only one among a multitude of other institutions, such as churches and corporations, which a community establishes for securing different objects, though obviously it is one of tremendous importance; none the less it is not an all-embracing institution, not something from which, or within which, all other institutions and associations have their being; many institutions, e.g. the Roman Catholic Church, and many associations, e.g. federations of employers and of workers, transcend the boundaries of any single state. Nor should a state be confused with a nation, although in modern times many states are organized on a national basis, and although also the terms are sometimes used interchangeably,

as in the title 'United Nations', which is actually a league of states, and even in the term '*international law*'; a single state, like the British Empire, may include many nations, or a single nation may be dispersed among many states, as the Poles were before 1919. Further, the term 'state' is relative, for there may be states within a state. Whether a smaller entity, having certain institutions of self-government but contained within a larger, should be called a state or not, is generally felt to depend upon the extent of its powers; but there can be no exact rule. A state of the American Union is invariably called a state, whereas an English county is not; a province of Canada, which has powers intermediate between these two, might or might not be so called. It is not, however, with all the institutions which in common parlance are called states that international law is concerned, but only with those whose governmental powers extend to the conduct of their external relations. Whether a state has such powers or not is a question of fact which must be answered by examining its system of government; the terminology which is used in the classification of composite states, or states which are 'composed of' other states, is an unsafe guide, both because different writers use the same terms in different senses, and also because the possible variations of state organization and interstate relations, ranging as they do from mere alliance for temporary purposes to complete amalgamation or subordination, are so many that a permanently valid classification is impossible. But it is usual to-day

to distinguish a *federal state*, that is to say, a union of states in which the control of the external relations of all the member states has been permanently surrendered to a central government so that the only state which exists for international purposes is the state formed by the union, from a *confederation of states*, in which, though a central government exists and exercises certain powers, it does not control all the external relations of the member states, and therefore for international purposes there exists not one but a number of states. Thus the United States since 1787, the German Republic from 1918 to 1933, and the Swiss Confederation since 1848, each form a single federal state, whereas the United States from 1778 to 1787, and the German Confederation from 1820 to 1866, were confederations of many states. This distinction would be convenient if it were always observed, but unfortunately it is not; for example, the Swiss Republic is always styled a *confederation*. But even so it would be difficult to classify all the states to which the classification is relevant definitely under one or other of the two heads; for example, the German Empire from 1870 to 1918 was in essence a federal state, but in form it retained some traces of a confederation of states, since Bavaria and some of the other member states were separately represented in foreign countries for certain limited and mainly honorary purposes.

§ 2. *Independent<sup>1</sup> and Dependent States*

The states with whose relations international law is primarily concerned are those which are 'independent' in their external relations; it is also to some extent concerned with a few states which 'depend' on other states in the conduct of those relations in a greater or less degree. This simple fact that there exist 'dependent' as well as 'independent' states is sufficient to show that independence cannot be a fundamental right of states as such, even if there were no other objections to the doctrine of fundamental rights. The proper usage of the term 'independence' is to denote the status of a state which controls its own external relations without dictation from other states; it contrasts such a status with that of a state which either does not control its own external relations at all, and is therefore of no interest to international law, like the State of New York, or controls them only in part. The exact significance of the term appears most clearly in such a phrase as 'declaration of independence', whereby one state throws off the control by, or its dependence on, another.

Independence is merely a descriptive term; it has no moral content. It may or may not be morally right or socially desirable that an actually independent state should remain independent, or that some community should break away from an existing state

<sup>1</sup> The dissenting opinion of M. Anzilotti in the case of the Austro-German Customs Union before the Permanent Court contains a useful discussion of the meaning of 'independence'. (Reports of the P.C.I.J., Series A/B, No. 41, pp. 57-8.)

and form an independent state of its own. To insist on a 'right', and particularly on a 'natural right' of independence, suggests that for a state to pass from the condition of independence to that of dependence, as the American States did when they formed the Union, necessarily involves a moral loss, instead of a mere change of legal status to be judged according to the circumstances of the case. Further, it should be noted that 'independence' is a negative term; we cannot legitimately infer from it anything whatsoever about the positive rights to which a state may be entitled. In particular, we have no right to argue as though an independent state had a right to determine its own conduct without any restraint at all; 'independence' does not mean freedom from law, but merely freedom from control by other states. Unfortunately, such a method of argument is very common; the associations of sovereignty have become attached in the popular mind to the notion of independence, and the word is often used as though it meant freedom from any restraint whatsoever, and appealed to as a justification for arbitrary and illegal conduct. The temptation to mistake catchwords for arguments is strong in all political controversy; it is especially dangerous in the controversies of states.

§ 3. *The Doctrine of the Equality of States.*<sup>1</sup>

The doctrine of equality was introduced into the theory of international law by the naturalist writers.

<sup>1</sup> Cf. Dickinson, *Equality of States in International Law*, and Baker in *B.Y.I.L.*, 1923-4.



They argued that as men in the 'state of nature', that is to say, before their entry into the political state, were equal to one another, and as states are still in a 'state of nature', therefore states must be equal to one another. The argument, however, is based on unsound premisses, and in its natural meaning the conclusion is contradicted by obvious facts, for by whatever test states are measured—size, population, wealth, strength, or degree of civilization—they are not equal, but unequal to one another. When, therefore, this doctrine requires us to believe that states are equal in law despite these obvious inequalities in other respects, we are bound to ask what are the practical consequences which are supposed to follow from this legal equality, and when we do that we shall find it difficult to find any consequence which does not equally follow from, and is not better explained by, the fact that states are independent. That at least seems to be true of the list of four consequences which Oppenheim tells us follow from the doctrine of equality of states: they are (*a*) that when a question arises which has to be settled by consent, every state has a right to a vote and to one vote only; (*b*) that the vote of the weakest state has as much weight as the vote of the most powerful; (*c*) that no state can claim jurisdiction over another; and (*d*) that the courts of one state do not as a rule question the validity of the official acts of another state in so far as those acts purport to take effect within the latter's jurisdiction.<sup>1</sup> These are all true statements of the law,

<sup>1</sup> *International Law*, 6th ed., vol. i, p. 238.

but no theory of equality is needed to explain or justify them.

But the doctrine of equality is worse than merely redundant, for it may easily become seriously misleading. If it merely means that the rights of one state, whatever they may be, are as much entitled to be protected by the law as the rights of any other, that is to say, if it merely denies that the weakness of a state is any excuse in law for disregarding its legal rights, then the statement is true, but obvious. But it is not true if it means, as it is easily understood to mean, that all states have equal rights, any more than it is true that all Englishmen have equal rights in our law, though they are all equally entitled to have whatever rights they have upheld by the law. Politically the Great Powers have long exercised a primacy among states, and both in the Covenant and the Charter this has been converted into a legal primacy. Some states again are under protectorates; some have had their territorial jurisdiction limited by the system of Capitulations; some have legal obligations towards minorities among their own subjects from which other states are free. If it is said that all states *ought* to have equal rights whether they actually do or not, then the doctrine ceases to be merely innocuous and becomes mischievous. That argument was advanced at the Hague Conference of 1907, when a scheme for setting up an international court of justice was wrecked by the refusal of some of the smaller powers to accept anything less than equal representation for all states on the court. It is

desirable that the society of states should become a better organized society than it has been in the past, but it would be obstructive of progress that every state, large or small, should claim an equal voice in every new co-operative enterprise. The cry of 'one state, one vote' in the management of affairs which the society of states decides are of general international concern is a quite spurious application of a nominally democratic principle.<sup>1</sup>

#### § 4. *Types of Dependent States*

Primarily, as we have seen, international law deals with the relations of independent states to one another. It is also to some extent concerned with certain other states, which, though partly controlled by another state, still maintain some relations with states other than that which controls them. This relation of dependency is sometimes described as a *protectorate*, sometimes as a *suzerainty*, but it is difficult to give precise juristic signification to either term; the degree of control on one side and of dependency on the other may vary indefinitely, and in any case it must be deduced from the events or treaties which created the relation, and not from the term used to describe it. This was laid down in 1923 by the Permanent Court in the following terms:<sup>2</sup>

'The extent of the powers of a protecting state in the

<sup>1</sup> Thus the system of voting in the General Assembly (*v. s.*, p. 101) gives a very unfair influence to the smaller powers, especially in budgetary matters.

<sup>2</sup> Advisory Opinion No. 4, p. 27. The case of the *Nationality Decrees issued in Tunis and Morocco*.

territory of a protected state depends, first, upon the treaties between the protecting state and the protected state establishing the protectorate, and, secondly, upon the conditions under which the protectorate has been recognised by third powers as against whom there is an intention to rely on the provisions of these treaties. In spite of common features possessed by protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.<sup>1</sup>

A relation of dependency sometimes exists between two states in fact, but for political reasons is not avowed either as a protectorate or a suzerainty. Thus the United States has at times exercised far-reaching control over the nominally independent states of Central America; during the present century many of these countries have suffered one or more periods of American military government; and even when the native governments have been allowed to function, American officials have controlled the expenditure, collected the customs, commanded the constabulary, had the right to construct naval bases for American use and a practically complete control of foreign relations. A similar *de facto* protectorate by Great Britain over Egypt also existed from 1882 until 1914, when a protectorate was openly declared.

The danger of deducing the legal incidents of the relation from the term by which it is described was illustrated in the discussion which preceded the South African War of 1899.<sup>1</sup> The question between Great

<sup>1</sup> Cf. Westlake, *Collected Papers*, p. 442.

Britain and the South African Republic, so far as it was a legal one, was whether the latter state had carried out the terms of the Convention of Pretoria, 1881, as modified by the Convention of London, 1884. But the controversy was confused and embittered by arguments attempting to show that Great Britain was entitled to rights of control other than those expressly stipulated for, because the former convention had described the relation then set up as a 'suzerainty'. With this should be contrasted the treatment of the matter in the judgement of Dr. Lushington in the case of *The Ionian Ships* (1855; 2 Spinks, 212). During the Crimean War these ships, the property of Ionian citizens, were brought in for adjudication on a charge of trading with the enemy; but the owners claimed that their country was at peace with Russia, and their trade therefore lawful. The Treaty of Paris, 1815, had declared 'the United States of the Ionian Islands' to be an independent state under the protection of Great Britain, and Dr. Lushington treated the question whether Ionians were British subjects as turning not on any general principle, but on the construction of the relations established by the particular treaty. In the result he held that the Islands were a separate state not automatically involved in the wars of Great Britain; that Great Britain had the right under the Treaty to make war and peace on their behalf, but that on this occasion she had not exercised it; the ships were, therefore, not liable to condemnation.<sup>1</sup>

<sup>1</sup> Professor H. A. Smith (*Great Britain and the Law of Nations*,



At the present time there appears to be no instance of a relation between states which is described as a suzerainty. The term was applied to the relation between Great Britain and the South African Republic, and also to that between Turkey and Bulgaria from 1878 to 1909, but it seems likely to disappear from diplomatic terminology. Instances in which the existence of a protectorate over a state of European civilization is openly avowed are also at present few and unimportant; Andorra is under the joint protectorate of France and Spain, San Marino under that of Italy, and Monaco under that of France. There still exist a few protectorates over states of Oriental civilization, such as that of France over Tunis, but the growth of national sentiment in all parts of the world makes any extension of the status unlikely.

In contrast with these types of dependent states the status of 'neutralization' involves no impairment of independence. A neutralized state is merely one whose integrity has been permanently guaranteed by international treaty, conditionally on its maintaining a perpetual neutrality except in its own defence. Switzerland, the only remaining example of the status, was neutralized by the Treaty of Vienna, 1815, and the provision was reaffirmed by the Treaty of Versailles, 1919. Belgium and Luxemburg, which were neutralized by the Treaties of London of 1831

vol. i, p. 68) shows that this decision conflicted with the view held in diplomatic and executive quarters, and that there are grave objections to holding that a protected state can be neutral when the protecting power is at war.

and 1867 respectively, ceased to have that status after the war of 1914. Switzerland is very tenacious of her status and scrupulous in performing its obligations; and when she joined the League of Nations, she did so on the understanding that she would not be required to take part in military action or even to permit the passage of foreign troops over her territory.

§ 5. *Commencement of the Existence of a State*

A new state comes into existence when a community acquires not momentarily, but with a reasonable probability of permanence, the essential characteristics of a state, namely, an organized government, a defined territory, and such a degree of independence of control by any other state as to be capable of conducting its own international relations. Occasionally a new state has been formed in territory not previously under the rule of any state; as when in 1836 Boers from Cape Colony trekked northwards and founded the South African Republics, or when in 1847 emancipated negroes from the United States founded the Liberian Republic. But generally in modern times a new state has been formed by the division of an existing state into more states than one.

Whether or not a new state has actually begun to exist is a pure question of fact; and as international law does not provide any machinery for an authoritative declaration on this question, it is one which every other state must answer for itself as best it can. Sometimes the circumstances make the answer ob-

vious; as when the union between Sweden and Norway was dissolved by agreement in 1905, and each of these countries commenced a separate international existence. But often the question is both difficult and delicate, especially when part of an existing state is forcibly endeavouring to separate itself from the rest; for a premature recognition of the independence of the revolting part would be an unwarrantable intervention in the internal affairs of the other state. It is impossible to determine by fixed rules the moment at which other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst on the other hand mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it.

The legal significance of recognition is controversial. According to one view it has a 'constitutive' effect; 'through recognition only and exclusively a state becomes an international person and a subject of international law'.<sup>1</sup> But there are serious difficulties in this view. The status of a state recognized by state A but not recognized by state B, and therefore apparently both an 'international person' and not an 'international person' at the same time, would be a legal curiosity. Perhaps a more substantial difficulty is that the doctrine would oblige us to say that an unrecognized state has neither rights nor duties at international law, and some of the

<sup>1</sup> Oppenheim, *International Law*, 6th ed., vol. i, p. 122.

consequences, of accepting that conclusion might be startling. We should have to say, for example, that an intervention, otherwise illegal, would not have been illegal in Manchukuo, or that if Manchukuo had been involved in war, she would have been under no legal obligation to respect the rights of neutrals. Non-recognition may certainly make the enforcement of rights and duties more difficult than it would otherwise be, but the practice of states does not support the view that they have no legal existence before recognition.<sup>1</sup>

The truth seems to be that the granting of recognition to a new state is a political rather than a legal act. It is not a 'constitutive' but a 'declaratory' act; it does not bring into legal existence a state which did not exist before. A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them as a state. The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely, the independence of the body claiming to be a state, and to declare the recognizing state's readiness to accept the normal consequences of that fact, namely, the usual courtesies of international intercourse. But in practice, and more especially in recent years, non-recognition does not always imply that

<sup>1</sup> See on this point Jaffé, *Judicial Aspects of Foreign Relations*, at p. 98. When Jewish airmen shot down British aeroplanes over Egypt in January 1949 the British Government at once informed the government of the Jewish state, which at that time we had not recognized, that we should demand compensation.

the existence of the unrecognized state is a matter of doubt. States have discovered that the granting or withholding of recognition can be used to further a national policy; they have refused it as a mark of disapproval, as nearly all of them did to Manchukuo; and they have granted it in order to establish the very independence of which recognition is supposed to be a mere acknowledgement, as when in 1903 the United States recognized Panama only three days after it had revolted from Colombia and at the same time took steps to prevent the re-establishment of Colombian sovereignty, or when in 1948 the United States recognized Israel within a few hours of its proclamation of independence.<sup>1</sup>

The recognition of a new state as independent must be distinguished from the recognition as belligerent of a part of a state in rebellion against its legitimate government. In normal circumstances the existence of a rebellion within a state is a domestic matter with which other states have no concern, but it sometimes takes a form in which this attitude of detachment can no longer be fairly demanded of

<sup>1</sup> On the occasion of the recognition of Israel, Mr. Warren R. Austin, the representative of the United States on the United Nations Security Council, asserted the political character of the act of recognition in the most unequivocal terms: 'I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the *de facto* status of a state. Moreover I would not admit here, by implication or by direct answer, that there exists a tribunal of justice or of any other kind, anywhere, that can pass upon the legality or the validity of that act of my country.' (Reported in the *New York Times* of May 19, 1948.)



them. Two conditions must be satisfied before an outside state is justified in acting. In the first place the operations must have reached the dimensions of an actual war; that is to say, the rebels must be organized under a government which controls a certain territory of its own, which sees that the laws of war are observed by its troops, and in general which is acting for the time being like the government of an independent state at war. There need be no assurance of this government's permanence, for that is clearly a matter which can only be determined by the issue of the war. In the second place the course of the war must be such that other states cannot simply stand aside from it. This may happen even if hostilities are confined to the land; for example, the troops of one party may cross the frontier of a neighbouring state and thus compel that state to decide whether to intern them, which would be to recognize them as belonging to an army at war, or to leave them at large, which is likely to be a dangerous course for itself. When the war extends to the sea, it is almost inevitable that any state which possesses a mercantile marine will be compelled to make a decision for or against the recognition of the rebels, since it will have to decide whether or not to allow the exercise against its own subjects of the rights which the existence of a maritime war gives to belligerents. If it allows their ships to be searched for contraband goods or captured for breaking a blockade, it thereby recognizes the existence of a regular war, because nothing but war could render those acts per-

missible: if it refuses, it may have to back its refusal by force and thus be drawn into the war. Its position would be intolerable if it could be required to allow belligerent rights only to the legitimate government and to refuse them to the rebels, since that would be to force it to take sides in the quarrel. In such circumstances, therefore, other states are within their rights in declaring themselves neutral in the struggle, and since there can be no neutrals unless there are two belligerents, such a declaration is equivalent to a recognition of the belligerency of both parties.

The effect of a recognition of belligerency is that the state giving it demands and accepts for itself all the consequences which follow from the existence of a regular war; it claims the rights of a neutral, and accords the rights of a belligerent to the warring parties. Further, the act is also advantageous to the state against which the rebellion is made, since it is relieved thereby of responsibility for the acts of its own rebellious subjects towards other states. But the effects of the recognition are purely provisional; it puts both belligerent parties in the position of states; but only for the purposes and for the duration of the war. It differs radically, therefore, from a recognition of the revolting part of a state as independent. None the less the granting of recognition of belligerency to rebels is a step often resented by the state to which they belong, and its judgement of the propriety of the recognition is likely to differ from that of the recognizing state. The choice of the time for granting recognition is therefore a delicate matter. The test

has been already indicated; recognition is justified when an actual war is being waged and when the state granting it is, or seems likely to be, forced into a position where it cannot avoid taking some action, either recognition or refusal of recognition, in relation to the war.<sup>1</sup>

§ 6. *Continuity and Termination of the Existence of a State*

The government of a state must not be identified with the state itself, but between states intercourse is only possible if each has a government with which the others may enter into relations and whose acts they may regard as binding on the state itself. What form

<sup>1</sup> In the Spanish Civil War of 1936-9 foreign states, for political reasons which differed in the case of different states, did not formally recognize the belligerency of the contending parties. But it was found impossible to carry out consistently a policy which refused to recognize the patent fact that a war in the fullest sense was being waged. For example, the Non-Intervention Agreement, by which a large number of states undertook to forbid their nationals to export munitions to either party, was either a recognition of the fact of war, or it was, as the legitimate Spanish Government alleged, a highly unfriendly act towards that Government. Britain, too, though refusing to allow either side to exercise belligerent rights against British ships on the high seas, declined to protect them in Spanish territorial waters where, on the hypothesis that no war was being waged, it was equally unlawful to molest them. Other anomalies to which the policy of non-recognition led are given in an article, 'Some Problems of the Spanish Civil War', by Prof. H. A. Smith, in *B.T.I.L.*, 1937, p. 17. His conclusion is that the accepted rules which govern the attitude of foreign powers in a civil war are the fruits of experience, and have proved effective in the past in confining such wars within the limits of the countries in which they have broken out. He doubts whether any temporary advantage can in the long run outweigh the harm which is done by the disregard of well-tried principles.

of government a state should adopt, and whether it should replace an existing government by a new one, are domestic matters with which other states are not concerned. But they are concerned to know whether the person or persons with whom they propose to enter into relations are in fact a government whose acts will be binding at international law upon the state which they profess to represent.

The law regarding this question has been clearly stated in an award of Chief Justice Taft in an arbitration between Great Britain and Costa Rica in 1923.<sup>1</sup> Great Britain claimed that certain British companies had acquired certain rights against Costa Rica by contracts entered into with one Tinoco. It appeared that in 1917 Tinoco overthrew the existing government of Costa Rica and established a new constitution which lasted till 1919, when the old constitution was restored; and that in 1922 the restored government passed legislation nullifying all engagements entered into by Tinoco's government. The Chief Justice held that if Tinoco's government was the actual government of Costa Rica at the time when the rights were alleged to have been acquired, the restored government could not repudiate the obligations which his acts had imposed on the state of Costa Rica. He further said that this question must be decided by evidence of the facts. It was immaterial that by the law of Costa Rica Tinoco's government was unconstitutional. Even the objection put forward by Costa Rica that many states, including

<sup>1</sup> Reported in *A.J.I.L.*, 1924, p. 147.

Great Britain herself, had never recognized Tinoco's government, was only relevant as suggesting that that government had not been the actual government of Costa Rica; but since Tinoco 'was in actual and peaceable control without resistance or conflict or contest by any one until a few months before the time when he retired', he held that his acts were binding upon Costa Rica. On the further question of the merits of the companies' claims, his decision on the whole favoured that state.

This decision therefore shows that a state is bound internationally by the acts of the person or persons who in actual fact constitute its government. This is sometimes expressed by saying that a new government 'succeeds' to the rights and obligations of its predecessor, but the expression is a loose one, because international rights and obligations belong to states and not to governments, and a new government 'succeeds' to them only in the sense that it becomes the government of a state to which they are attached. It follows, therefore, that the identity of a state is not affected by changes in the form or the persons of its government, or even by a temporary anarchy, as in China or Mexico in recent years. But constitutional changes may make it difficult for other states to know who, if any one, is in a position to bind the state, and may thus give rise to the problem of deciding whether or not they will recognize a new government. The recognition of a new government is not to be confused with the recognition of a new state, but it raises problems in some respects similar. In both cases a



premature recognition is an intervention in the domestic affairs of another state, and in both the question which other states have to decide is one of fact. Recognition of a government, again, like recognition of a state, is a political rather than a legal act, and it also is capable of being used as an instrument of policy; for example, the United States has at times, especially under President Wilson, refused to recognize new governments which have been set up by force in Central America. But to refuse to recognize facts because they are unpleasant is apt to be inconvenient, and such a policy is difficult to carry out consistently for long or against any but weak states, as those states which refused to recognize the government of the Soviets, including the United States itself, eventually discovered. A distinction, however, which is diplomatic or political rather than legal, has been invented between recognition *de jure* and recognition *de facto*, and this meets the case where a state, either because the position is obscure or for political reasons, is reluctant to recognize definitively some other state or government which does in fact exist, but yet finds it necessary for practical reasons to enter into some sort of official relations. Recognition *de facto* is provisional; it means that the recognizing government offers for the time being to enter into relations, but ordinarily without cordiality, and without the usual courtesies of diplomacy. But the terminology is misleading in more ways than one. It is not the act of recognition that is *de jure* or *de facto*, but the state or the government, as the case may

be, that is recognized as existing either *de jure* or *de facto*. Moreover, it is not clear what law, international or municipal, is supposed to be referred to when a situation is said to be recognized *de jure*. Neither of these makes good sense. If a state or a government does actually exist, then, *for the purposes of international law*, it necessarily exists *de jure*; that law is not concerned to ask how the state or the government has come into existence. On the other hand the recognizing state is not concerned with the question whether the state of things which it is recognizing is legal by the municipal law of another state; for the recognizing state it is irrelevant that a new state may have come into existence by civil war, or that a government may be a revolutionary government.

Non-recognition of a foreign government is more than a refusal to enter into relations. From 1917 to 1921 Great Britain refused to recognize the Soviet Government. In 1921 we recognized that government as the *de facto*, and in 1924 as the *de jure*, government of Russia. In 1927 we broke off diplomatic relations with it. That action did not mean that we ceased to recognize the Soviet Government as the government of Russia; we merely declined to deal with that government. It has, however, been pointed out<sup>1</sup> that non-recognition as practised to-day (that is to say, when it is used for some ulterior political purpose, and not because the stability of the government in question is really a matter of doubt) differs very little from the breaking off of diplomatic relations,

<sup>1</sup> Cf. Jaffé, loc. cit., p. 148.

and this seems to be true so far as the international consequences of either are concerned; and that it may be largely a matter of chance, depending on whether it is a new or an old government which displeases us, which will be used.

✓ But if the international significance of recognition, whether of a state or of a government, is political rather than legal, recognition has important indirect effects, at any rate according to English and American views, in the administration of the municipal law of the recognizing state. ✓ The representatives and the property of a foreign state or government are immune from legal process, and the validity of such a government's acts in its own country "cannot be questioned in our courts; but our courts regard it as a matter for the Executive and not for themselves to determine whether an entity claiming to be a state, or persons claiming to be a government, ought to be treated as a state or government for these purposes. For the courts, therefore, recognition may be said to have a 'constitutive' effect. If, for instance, the Tinoco case had come before an English court, it would have been obliged to hold that as our government had never recognized Tinoco, he never was the government of Costa Rica and therefore his acts had never bound that state. ✓ In *Luther v. Sagor* the English courts had to deal with a claim to certain timber which had been the property of the plaintiff company in Russia; it had been confiscated by legislation of the Soviet Government, sold by them, and subsequently brought to England by the purchaser. At

the time when the case was heard by Roche J. the British Government had not recognized the Soviet Government, and he accordingly gave judgement for the plaintiffs. But before the case was heard by the Court of Appeal the Soviet Government had been recognized with retrospective effect as a *de facto* government, and the Court therefore reversed the decision of Roche J., holding that the Soviet legislation had been effective to pass the title in the timber.<sup>1</sup>

*Luther v. Sagor* shows that the English courts will acknowledge as valid the legislation of a foreign government recognized by Great Britain, even though the recognition is only *de facto*. Further, the House of Lords has held, in the case of the *S.S. Arantzazu Mendi*,<sup>2</sup> that General Franco's government, at a time during the Spanish Civil War when, according to the information supplied by the Foreign Office to the courts, it was recognized by us 'as a government which at present exercises *de facto* administrative control over the larger portion of Spain', could not be impleaded in an English court. For these two purposes therefore our courts evidently regard the legal effects of *de jure* and *de facto* recognition as identical. Whether they would regard the distinction as legally immaterial for all purposes is perhaps not yet certain.

A change in the extent of a state's territory has in principle no effect on its international identity, but in practice difficult cases may occur. Thus when two states become united, it may not always be easy

<sup>1</sup> [1921] 1 K.B. 456, and 3 K.B. 532.

<sup>2</sup> [1939] A.C. 256.

to determine whether one of the two has annexed the other, or whether both have merged their separate identities so as to form a single new state. For instance, it might seem natural to regard Italy as a new state formed by the union of the several independent states of the Italian Peninsula, but in fact she regards herself as, and has been accepted as being, the kingdom of Piedmont territorially enlarged by annexation of the other Italian states.<sup>1</sup> Similarly, when one existing state breaks up into more than one it may be difficult to say whether the old state has been extinguished and its place taken by two or more new states, or whether the old state continues to exist with its territory reduced by the separation from it of a new state or states. The republic of Austria, created after the First World War, was probably a new state, and not the old empire of Austria-Hungary with a new form of government and a reduced territorial extent. On the other hand, the present Turkish Republic seems to be regarded as a continuation of the former Turkish Empire, in spite of the many new states which have been carved out of its former territories.<sup>2</sup>

In all cases of the transfer of territory from one state to another, whether the event involves the extinction of a state or not, the point of chief legal interest is to determine the effect, if any, of the transfer on the international rights and duties of the states concerned.

<sup>1</sup> See, for example, the case of *Gastaldi v. Lepage Hemery*, Annual Digest, 1929-30, Case No. 43.

<sup>2</sup> See *Ottoman Debt Arbitration*, Annual Digest, 1925-6, Case No. 57.



This question is often regulated by the provisions of a treaty of cession, but unless so regulated it does not admit of a simple answer, and the problems which it raises cannot be solved by assuming a general principle of 'state succession' and then proceeding to deduce its consequences. 'Succession' is primarily a principle of private law, and suggests that the extinction of a state is in some sense comparable to the death of an individual. But states do not die in any literal sense; their population and their territory do not disappear, but merely suffer political change. Moreover, succession is a notion taken from the law of property; and it is easy to be misled by the suggestion that something analogous to the transfer of property takes place when people and territory cease to form part of one state and begin to form part of another. It is safer to proceed by examining the actual practice of states to see how far any fixed rules have been formed on this matter. We may treat it under the heads of treaties, property, contracts, and wrongs.

In principle the mere cession of a piece of territory from one state to another does not affect the treaty rights or obligations of either. Nor are these rights and obligations affected when part of an existing state breaks off and becomes a new state; they remain with the old state, and the new state starts its career without any. Further, when a state ceases to exist, its treaties generally cease with it. This is admitted in the case of political treaties, e.g. treaties of alliance; and there is very little authority for the suggestion that non-political treaties pass to the state or states

which take the place of the extinguished state. Thus in 1896 when France annexed Madagascar she applied the French tariff, disregarding certain trading rights to which Great Britain and the United States were entitled by treaties with the Queen of Madagascar; and Japan acted in the same way when she annexed Korea in 1910. One class of treaty, however, is alleged to constitute an exception to this principle, but even this is doubtful. There are treaties, sometimes called 'dispositive' treaties, which are regarded as impressing a special character on the territory to which they relate, and creating something analogous to the servitudes or easements of private law; and there is some authority for saying that when a state takes over territory affected by a treaty of this kind it takes over not the mere territory itself, but the territory with rights and obligations attached to it. A treaty of neutralization or one regulating the use of a boundary river are examples of such treaties.

State property situated within the transferred territory, such as public buildings, government funds in the banks, or state railways, passes to an annexing state; or, if a state ceases to exist, then all its property, wherever situated, passes to the state to which the sovereignty over its territory has passed. In *Haile Selassie v. Cable & Wireless Co. Ltd.*<sup>1</sup> the Emperor Haile Selassie had obtained judgement in the Chancery Division for a sum of money owing by the company to the government of Ethiopia, at a time when

<sup>1</sup> [1939] Ch. 182. See also the case of *U.S. v. McRae* (1869) L.R. 8 Eq. 69.

he was still recognized by the British Government as the *de jure* ruler of Ethiopia; but before the case came on in the Court of Appeal the British Government had recognized the King of Italy as the *de jure* Emperor of Ethiopia, and it was held that the judgement must be reversed, the right to the debt having become vested in the King. The same principle was applied after the American Civil War to property of the Confederate Government situated in England, when the British Government handed over to the United States the Confederate cruiser *Shenandoah*, which had taken refuge in Liverpool.

How far an annexing state takes over the contractual liabilities of a state whose territory it annexes is a question of much difficulty. Oppenheim<sup>1</sup> was of opinion that 'the recent practice of states . . . tends to establish as a rule of international law the duty of a successor state, whether the succession arises upon cession or annexation or dismemberment, to respect the acquired rights of private persons whether proprietary, contractual, or concessionary'. On the other hand, an English court in *West Rand Central Gold Mining Co. v. the King*<sup>2</sup> adopted a contrary but equally extreme position, and declared that 'the conquering sovereign can make any conditions he thinks

<sup>1</sup> Oppenheim, *International Law*, vol. i, 4th ed., p. 168 (note).

<sup>2</sup> [1905] 2 K.B. 391. The case is open to many criticisms, and the actual decision did not require so sweeping a generalization. Moreover, the case was a petition of right in which the suppliant, an English company, sought to recover from the Crown the value of gold seized by the government of the former South African Republic. The case decides that an English court can give no relief in

fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them'. The former of these views is probably in advance of, but the latter is certainly behind, the actual state of international law on this matter.

The Permanent Court has more than once had occasion to refer to the question, though it has not formulated any comprehensive rule; probably no rule applying indifferently to contractual rights and liabilities of all kinds is to be expected. In the case of the *German Settlers in Poland*,<sup>1</sup> after declaring that 'private rights acquired under existing law do not cease on a change of sovereignty', the Court upheld as against Poland the rights of certain German settlers in the territory transferred from Prussia after the First World War. These settlers held their lands upon a special form of contract with the Prussian State which entitled them on certain conditions to a transfer of the full ownership thereof, and the contracts were upheld notwithstanding the fact that they had originally been made for the purpose of strengthening the German at the expense of the Polish element in the territory which had since become part of Poland. In the case of the *Mavrommatis Palestine Concessions*<sup>2</sup> the Court held that the administration of Palestine was bound to respect certain concessions

such a case, but it does not necessarily follow that if the company dispossessed of the gold had been a foreign company the Crown would have been under no international liability.

<sup>1</sup> Series B (Advisory Opinions), No. 6.

<sup>2</sup> Series A, Judgement No. 5.

granted by Turkey to a Greek subject for works to be carried out at Jerusalem. The Court has not had to deal with the assumption by a successor of the public debt of an annexed state, or of a proportionate part where part only of a state's territory is transferred. On this matter practice has varied, though it seems to be tending towards the acceptance of at any rate some liability. Sometimes an annexing state has recognized a legal obligation to accept liability; Italy appears to have done so when she took over from Austria the local debt of Lombardy in 1860. Sometimes it has taken over part of a state's general debt on annexing territory, although the debt was not charged on the territory; thus Prussia took over part of the Danish debt when she annexed Schleswig-Holstein in 1866. Sometimes it has accepted partial liability without admitting any legal obligation to do so; Great Britain acted in this way after the South African War. Possibly the solution of the matter is to be found by considering the nature of the contract, and particularly whether the identity of the original contracting state is or is not a material element in it. Thus it is generally assumed that an annexing state is not bound to take over a public debt incurred for the purpose of financing a war against itself. On the other hand, in a concession contract for the execution of works of public utility, as in the *Mavrommatis* case, or in a sale of lands, as in the *German Settlers* case (apart from the political purpose in that case, which the Court disregarded), the identity of the contracting state is immaterial. But it must be admitted that



this distinction is not definitely formulated in the cases.

A decision of the Anglo-American Pecuniary Claims Tribunal, established under a convention of 1910, has dealt with the question of the liability of an annexing state for the wrongful acts of the state whose territory is annexed. Before the annexation of the South African Republic by Great Britain a quarrel broke out between the government of President Kruger and the courts of the Republic, in the course of which he dismissed the Chief Justice from office and reduced the courts to a state of dependence on the executive government. The Tribunal found as a fact that in consequence of this state of 'legal anarchy', an American citizen, Robert E. Brown, suffered a denial of justice in connexion with certain gold-mining claims. The United States now preferred Brown's claim against Great Britain as the successor of the South African Republic. It was admitted by the American agent that there is no general liability at international law for the torts of a defunct state; but the Tribunal, in dismissing the claim, went farther, and held that a state acquiring territory by conquest is under no obligation to take affirmative steps to right a wrong that may have been committed by its predecessor.<sup>1</sup> The law on this point is reasonably clear.

<sup>1</sup> 'The Robert E. Brown Claim': *B.Y.I.L.*, 1924, p. 210.

## THE TERRITORY OF STATES

§ 1. *Territorial Sovereignty*

AT the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states. When a state exercises an authority of this kind over a certain territory it is popularly said to have 'sovereignty' over the territory, but that much-abused word is here used in a rather special sense. It refers here not to a relation of persons to persons, nor to the independence of the state itself, but to the nature of rights over territory; and in the absence of any better word it is a convenient way of contrasting the fullest rights over territory known to the law with the minor territorial rights to be later mentioned. Territorial sovereignty bears an obvious resemblance to ownership in private law, less marked, however, to-day than it was in the days of the patrimonial state, when a kingdom and everything in it was regarded as being to the king very much what a landed estate was to its owner. As a result of this resemblance early international law borrowed the Roman rules for the acquisition of property and adapted them to the acquisition of territory, and these rules are still the foundation of the law on the subject.

§ 2. *Modes of Acquiring Territory*

The most important modes are occupation and cession; it will be necessary also to consider shortly conquest, prescription, and accretion.

Occupation is a means of acquiring territory not already forming part of the dominions of any state. Since all the habitable areas of the earth now fall under the dominion of some state or other, future titles by occupation are not likely to be frequent, but the law of the matter is still important because the occupations of the past often give rise to the boundary disputes of the present. The principles of law are fairly well settled; the difficulty of a boundary dispute generally arises in applying them to the facts, which may go back for centuries. In what is now the leading case on the subject, the judgement of the Permanent Court on the *Legal Status of Eastern Greenland*,<sup>1</sup> it was necessary to go back to events of the tenth century A.D.

The Eastern Greenland dispute arose out of the action of Norway in 1931 in proclaiming the occupation of certain parts of East Greenland. Denmark thereupon, acting under the Optional Clause of the Court's Statute,<sup>2</sup> asked the Court to declare the Norwegian proclamation invalid, on the ground that the area to which it referred was subject to Danish sovereignty, which extended to the whole of Greenland. The Court pointed out that a title by occupation involves two elements, 'the intention or will to act as sovereign, and some actual exercise or display

<sup>1</sup> Series A/B, No. 53.

<sup>2</sup> *Infra*, p. 258.

of authority'.<sup>1</sup> In these words the Court were affirming a well-established principle of law, namely, that occupation, in order to create a title to territory, must be 'effective' occupation, that is to say, it must be followed up by action, such as, in a simple case, the planting of a settlement or the building of a fort, which shows that the occupant not only desires to, but can and does, control the territory claimed. The Court were satisfied on the evidence that at any rate after a certain date, 1721, Denmark's *intention* to claim title to the whole of Greenland was established. But the areas in dispute were outside the settled areas of Greenland, and it was necessary therefore for the Court to examine carefully the evidence by which Denmark tried to satisfy the second necessary element in occupation, namely, the exercise of authority. On this they pointed out that the absence of any competing claim by another state (and until 1931 no state other than Denmark had ever claimed title to Greenland) is an important consideration; a relatively slight exercise of authority will suffice when no state can show a superior claim. They held too that the character of the country must be regarded; the arctic and inaccessible nature of the uncolonized parts of Greenland made it unreasonable to look for a continuous or intensive exercise of authority. Denmark was able to show numerous legislative and admini-

<sup>1</sup> Professor Ross, however, seems to be correct in saying that the subjective requirement of the 'will to act as sovereign' in addition to the objective display of authority is 'an empty phantom', a sort of vestigial relic of the *animus possidendi* of Roman law. *International Law*, p. 147.

strative acts purporting to apply to the whole of Greenland; a number of treaties in which other states, by agreeing to a clause excluding Greenland from their effects, had apparently acquiesced in her claim; and in recent years an express recognition of it by many states; and the Court held that in the circumstances this was sufficient evidence to establish her title to the whole of the country. The area which Norway claimed in 1931 was therefore not at that time a *terra nullius* capable of being acquired by her occupation.

On principle the area to which the legal effects of an occupation extend should be simply the area effectively occupied, and this is a question of fact. But politically a strict adherence to this principle is impracticable; a state which has effectively occupied a certain area may reasonably intend to extend it, or it may be that the security of the area occupied would be threatened if another state should occupy adjacent unoccupied territory. Hence states have usually claimed title to an area greater than that effectively occupied, and though the claims have often been extravagant the law recognizes some extension as reasonable. Mr. Hall's statement on this matter is as definite as it can safely be made, when he says that 'a settlement is entitled, not only to the lands actually inhabited and brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them'.<sup>1</sup>

<sup>1</sup> *International Law*, 8th ed., p. 129.



From the requirement that occupation must be 'effective' it follows that mere discovery of an unappropriated territory is not sufficient to create a title, for discovery alone does not put the discoverer in a position to control the territory discovered, however he may desire or intend to do so. But on this point the law makes a concession and allows the strict rule of effective occupation to be qualified by the doctrine of 'inchoate title'. Since an effective occupation must usually be a gradual process it is considered that some weight should be given to mere discovery, and it is regarded therefore as giving an 'inchoate title', that is to say, a temporary right to exclude other states until the state of the discoverer has had a reasonable time within which to make an effective occupation, or a sort of option to occupy which other states must respect while it lasts.

The effects of discovery were discussed by the arbitrator (M. Huber) in the *Island of Palmas* award.<sup>1</sup> The United States, as successor of Spain, claimed an island which lies half-way between the Philippines and the Dutch East Indies, mainly on the ground of its discovery in the sixteenth century. The arbitrator held that even if the international law of that century recognized mere discovery as giving a title to territory (though there is very little reason for thinking that it did), such a title could not survive to-day, when it is certain that discovery alone, without any subsequent act, does not establish sovereignty; whilst if the title originally acquired was 'inchoate' (as according to

<sup>1</sup> Text in *A.J.I.L.*, 1928, p. 867.

the modern doctrine it would be) it had not been turned into a definitive title by an actual and durable taking of possession within a reasonable time. It could not therefore on either view prevail over the continuous and peaceful display of authority, which the evidence satisfied him had been exercised by Holland.

Cession is a mode of transferring the title to territory from one state to another. It results sometimes from a successful war, sometimes from peaceful negotiations; it may either be gratuitous, or for some consideration, as when Denmark sold the Danish West Indies to the United States in 1916.

Conquest is the acquisition of the territory of an enemy by its complete and final subjugation and a declaration of the conquering state's intention to annex it. In practice a title by conquest is rare, because the annexation of territory after a war is generally carried out by a treaty of cession, although such a treaty often only confirms a title already acquired by conquest. A modern instance of title by conquest is that of Rumania to Bessarabia in the period between the two World Wars.

There is an obvious moral objection to the legal recognition of a title by conquest, but it is no greater than the moral objection to the recognition of an enforced cession of territory. That the latter has in the past conferred a valid legal title is undeniable, and it would have been idle for the law to have accepted the effects of force when the formality of a forced assent had followed and not otherwise. The attitude of the

law towards both these titles has been merely a corollary, but a necessary corollary, of its inability to regulate the use by states of armed force. So long as war continues to be used as an instrument of national policy, it will continue to produce the same results as it has in the past, and one of those results will be the annexation of territory.

It was proposed in 1932 by Mr. Stimson, then American Secretary of State, and his proposal has come to be known as the *Stimson Doctrine of Non-Recognition*, that states should refuse to recognize 'any situation, treaty or agreement which may be brought about contrary to the covenants and obligations of the Pact of Paris'. Thereby, he said, 'a caveat will be placed upon such actions which, we believe, will effectively bar the legality hereafter of any title or right sought to be obtained by pressure or treaty violation'. The Assembly of the League also passed a resolution to the same effect.

Unfortunately the legal consequences which Mr. Stimson foresaw for his doctrine are by no means sure. If non-recognition should leave unchanged the facts of which it marks disapproval, it would result in a discordance between the law and the facts which in the long run would merely advertise the impotence of the law. Within three years of the League Resolution Italy had conquered Ethiopia, and most of the League states had decided that it was expedient to recognize that Ethiopia had become Italian territory. The truth is that international law can no more refuse to recognize that a finally successful conquest

does change the title to territory than municipal law can a change of régime brought about by a successful revolution. What have hitherto been the legal consequences of successful war cannot in the long run be avoided by any change in the law, or any well-intentioned convention of states which does not also register a change in their practice in respect of war.

Prescription as a title to territory in international law is so vague that some writers deny its recognition altogether. But in fact most existing frontiers are accepted by international law simply because they have existed *de facto* for a long time; they exemplify the maxim *e facto oritur jus*, which is at the root of the notion of prescription in all systems of law. It is therefore no paradox to say that prescription is the commonest of all titles to territory; we only fail to recognize that it is so because the titles that depend on it are rarely called into question. On the other hand, there is a sense in which international law may be said not to recognize prescription; it recognizes the principle which lies behind prescription, but that principle has not been worked out into detailed rules as it has in more developed municipal systems. There are no fixed rules as to the length of possession which will give a good title, nor as to the *bona* or *mala fides* of its origin; it would be difficult to frame rules on such matters as these which would fit all the contingencies which might occur. Sometimes in submitting a territorial dispute to arbitration states have agreed to recognize a certain period of possession.

as a good root of title in the particular case, and the practice is one to be commended.

Accretion is the addition of new territory to the existing territory of a state by operation of nature, as by the drying up of a river or the recession of the sea. It is of little importance and the detailed rules on the matter need not here be considered.

### § 3. *Minor Rights over Territory*

#### (a) *Colonial protectorates*

In the latter half of the nineteenth century the appetites of the colonizing states of Europe for new territory in Africa outran their powers of digestion, and they introduced forms of staking out their claims in territories where for one reason or another they were for the time being unable or unwilling to make an effective occupation. One such device was the invention of 'colonial protectorates', the word 'protectorate' here describing a relation between a state and a native community not sufficiently civilized to be regarded as a state, and not, as heretofore, a relation of dependence between two states. As Westlake caustically remarks:

'The name had the double advantage of giving a flavour of international law to a position intended to exclude other states before such exclusion could be placed on the ground of duly acquired sovereignty, and at the same time of allowing that position to be abandoned with less discredit than attaches to the abandonment of sovereignty, if the country should be found less valuable than had been hoped.'<sup>1</sup>

<sup>1</sup> *International Law*, Part I, p. 120.



For the most part these new protectorates were established by agreements more or less voluntary with the native chiefs, and they generally lead to full annexation when the protecting state is ready for that step. In the meantime it claims to exclude any other state from making an occupation, or from maintaining any direct relations with the protected communities; conversely it accepts a somewhat vague obligation to maintain a reasonable degree of security for foreign subjects and property within the protected territory. But it is probably correct to say that the distinction between one of these protectorates and a colony is one of constitutional, rather than of international, law. When, for example, a few years ago we annexed the Kenya Protectorate as a colony, the change had no internationally legal significance. Constitutionally the most important difference is that the inhabitants of a protectorate do not take the nationality of the protecting state.

(b) *Spheres of influence*

Even the relaxation of the rules relating to occupation introduced by the establishment of colonial protectorates did not satisfy the appetites of the colonizing powers; and they invented an even more indefinite method of staking out their claims under the name of 'spheres of influence'. The very purpose of this device was that its incidents should be vague; and it means no more than that a state, without establishing its jurisdiction or undertaking any responsibility for securing good government, signifies

that it regards certain territory as closed to the ambitions of any other power, probably because it intends some day to convert it into a colony or protectorate, or because it regards it as strategically necessary to the security of part of its existing dominions. The mere assertion of a sphere of influence gives the influencing state no rights over the territory and is a political and not a legal act; but in practice the claim is often protected by treaties with the states most likely to be affected, and in any case to disregard it would be an unfriendly act.

(c) *Leases*

Leases of territory by one state to another which closely resemble the ordinary leases of private law, for example leases of specified areas in ports for transit purposes, are not uncommon; but there are other leases, political in character, in which it is usual to regard the use of the term as no more than a diplomatic device for rendering a permanent loss of territory more palatable to the dispossessed state by avoiding any mention of annexation and holding out the hope of eventual recovery. In 1898 China leased Kiao-Chau to Germany and other territories to Great Britain, France, and Russia, the Russian lease being transferred to Japan in 1905, and the German in 1919. But it has been justly pointed out<sup>1</sup> that this interpretation of the Chinese leases is inadmissible. Not only did China by the terms of the leases them-

<sup>1</sup> Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 183-90.

selves retain and actually exercise more than a nominal sovereignty over the leased territories; but even if the lessee states intended the leases as disguised cessions, this was certainly not the intention of the lessor, China, and we are not entitled to estimate the legal character of a transaction by conjecturing the undisclosed intentions of one of the parties only. Moreover, the event seems to have confirmed the straightforward construction of these leases, for at the Conference of Washington in 1922 the restitution of most of the territories to China was promised. In 1930 Great Britain returned to China the leased territory of Weihaiwei.

(d) *Trust territories*

After the First World War, article 22 of the Covenant of the League of Nations created a new status for the territories surrendered by Germany and Turkey to the Principal Allied and Associated Powers which were 'inhabited by peoples not yet able to stand by themselves'. The guiding principle of the new institution was declared to be that the well-being of these peoples forms a 'sacred trust of civilization'; and this trust was to be carried out by placing them under the 'tutelage' of different members of the League as 'mandatories on behalf of the League'.

This system of mandates has now been replaced under the Charter of the United Nations by the International Trusteeship system, but the objectives of the new system are much the same as those of the old. Some of these are of the type of pious platitudes

in which the Charter abounds, but the substantial objective is 'to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement'.

The relation of the authority administering a trust territory resembles in some respects a protectorate, but it is a 'responsible' protectorate in which the protecting power has obligations as well as rights both towards the inhabitants of the territory and towards the United Nations. There is to be 'equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice', but this is not to prejudice the fundamental objectives of the system. Most of the mandates allowed the military training of the natives only for local defence and police purposes; in trust territories the administering authority may use volunteer forces not only for these purposes, but also in carrying out its own obligations towards the Security Council.

A territory can only enter the trusteeship system by an individual agreement, and there are three kinds of territory to which the system may be applied. They are (a) territories previously held under mandate.

The surviving mandated territories have now, with the exception of South-West Africa,<sup>1</sup> been placed under trusteeship by their mandatories. (b) Territories detached from enemy states as a result of the Second World War. It is generally assumed that the Italian colonies and the Pacific islands detached from Japan will be brought into this category. (c) Territories voluntarily placed under the system by the states responsible for their administration. There are no territories in this category at present, and unless the system can win a greater measure of confidence than that with which it has started, it is unlikely that there will be any. The administering authority may be either one or more states, or the United Nations itself.

Generally the functions of the United Nations in relation to a trust territory belong to the General Assembly. But a trustee agreement may designate part or all of a trust territory as 'a strategic area or areas', and when an agreement contains this provision the Security Council exercises these functions,

<sup>1</sup> The question of South-West Africa is at present at a deadlock. Under its mandate for that territory the Union of South Africa has hitherto administered it as 'an integral portion' of its own territory, and in those circumstances its annexation, which the Union now desires to carry out, would be little more than a formal change. The General Assembly, however, has called upon the Union to submit a trustee agreement for the territory, but there is nothing in the Charter which compels the Union to do this, nor can the General Assembly compel it to do so. The present position is therefore that the mandate continues, but as the only responsibility of the mandatory is to the League of Nations, which is defunct, it is for practical purposes at an end.



including the approval of the agreement itself. The provision about strategic areas is believed to have been inserted in the Charter to meet the case of the Pacific islands, which the United States regards as necessary for American defence, but which the Atlantic Charter precludes her from annexing outright.

The General Assembly or the Security Council as the case may be has the assistance of a Trusteeship Council which has taken the place of the former Permanent Mandates Commission through which the Council of the League used to supervise the mandatory system. But the new body is constituted on a different plan. The Mandates Commission consisted of members chosen individually for their personal fitness for the work, and it had a majority drawn from non-mandatory states. The members of the Trusteeship Council are not individuals but states, though each state is required to designate 'one specially qualified person' to represent it; it consists of the states administering trust territories, of any of the five Great Powers which do not administer such territories, and of so many other members elected for three-year terms by the General Assembly as will ensure that the total membership is equally divided between states administering and those not administering trust territories. Its functions are to consider the annual reports which the administering authority for each trust territory within the competence of the General Assembly is bound to render; to formulate a questionnaire on the political,

economic, social, and educational advancement of the inhabitants of each trust territory; and to provide for periodic visits to the trust territories at times agreed on with the administering authority. The Mandates Commission proved itself in general a business-like body, willing to recognize the difficulties as well as the obligations of colonial administrators, and the experience which it accumulated from examining the practice of states with differing colonizing methods made it a valuable repository of information available to all. It remains to be seen whether the Trusteeship Council will be equally well suited to its task.

Under the mandatory system courts of law had on occasion to consider the nature and extent of the powers exercisable by the mandatory state, and it is probable that similar questions will also arise under the trusteeship system, and that some of the answers given will be equally applicable to both. In particular the question of sovereignty has been often discussed. It was held by the South African courts in *Rex v. Christian*<sup>1</sup> that the Union, as mandatory of South-West Africa, possessed sufficient internal sovereignty there to warrant a charge of high treason against an inhabitant of the mandated territory. Treason by South African law is an offence against a government which possesses *majestas* or sovereignty, and the nature of the Union's powers was thus very relevant to the point at issue. But in *Ffrost v. Stevenson*<sup>2</sup>

<sup>1</sup> *S.A. Law Rep.* [1924] Appellate Division, p. 101; *Ann. Dig.*, 1923-4, p. 27.

<sup>2</sup> *Ibid.*, 1935-7, p. 98.

the High Court of Australia had to decide a question relating to the extent of the legislative powers of the Commonwealth in the mandated territory of New Guinea, and in the course of his judgement Latham, C.J., used these words:

‘There has been much difference of opinion among jurists as to the question of sovereignty in relation to such territories. . . . I doubt whether any light can be thrown upon the question to be decided by this Court by considering the applicability to mandated territories of a conception which is itself so uncertain and so disputable as that of sovereignty. Authorities of the highest standing differ among themselves as to whether or not the conception of sovereignty is applicable, in what sense it is applicable, and, if it is applicable, as to where sovereignty resides. The grant of mandates introduced a new principle into international law. . . . The position of a mandatory in relation to a mandated territory must be regarded as *sui generis*. . . . The mandatory, as a kind of international trustee, receives the territory subject to the provisions of the mandate which limit the exercise of the governmental powers of the mandatory. . . . A mandated territory is not a possession in the ordinary sense.

It is believed that to introduce the concept of sovereignty into any discussion of the nature either of mandates or of trust territories is, from the point of view of international law, merely confusing. Municipal law, as in *Rex v. Christian*, may make it necessary to do so; international law does not. The notion that we must look for sovereignty in a mandated or a trust territory implies that sovereignty is an indestructible substance which we shall surely find

in any area if only we look closely enough. But government under mandate or trust is surely an alternative to, not a species of, government under sovereignty; and, just as our own law has two different régimes for the holding of property, namely private ownership and trusts, so now international law has acquired two régimes for government, that is to say sovereignty and the mandate or the trust. Like the rights of a trustee in our law, so the rights of an international trustee state have their foundation in its obligations under the Charter and under the trust agreement; they are tools given it in order to achieve the work assigned to it, and the measure of its powers, the test by which its possession of any particular power must be determined, is that the law has provided it with all the tools that are necessary for its task, but with those only.<sup>1</sup>

(e) *Servitudes*

Many writers maintain that international law recognizes rights over territory which correspond to the servitudes of Roman or the easements of English law, but the evidence they are able to adduce does not seem to bear out their contention. The exact point which is at issue in the controversy will be seen if we recall the nature of a servitude in Roman law: it is a right enjoyed by the owner of one piece of land, the *praedium dominans*, not in his personal capacity,

<sup>1</sup> This view was originally suggested by the writer in an article, 'Trusts and Mandates', in *B.Y.I.L.*, 1929, p. 217, which was referred to with approval by Evatt, J., in the Australian case cited in the text.

but in his capacity as owner of the land, over land which belongs to another, the *praedium serviens*. Its essential characteristic is that it is a right *in rem*, that is to say, it is exercisable not only against a particular owner of the servient tenement but against any successor to him in title, and not only by a particular owner of the dominant tenement but also by his successors in title. It is, of course, quite common that a state should acquire rights of one kind or another over the territory of another state, the right, for example, to have an airfield or free port facilities, but ordinarily at least such rights are merely rights *in personam* like any other treaty-created right; they do not in any way resemble servitudes. The test of an international servitude can only be, on the analogy of private law, that the right should be one that will survive a change in the sovereignty of either of the two states concerned in the transaction. There is no real evidence that any such right exists in the international system.

The leading case is the award of the North Atlantic Fisheries Arbitration between Britain and the United States in 1910. Americans enjoy certain fishing rights off the coast of Newfoundland under a treaty of 1818, and the United States argued that this treaty had created a servitude in their favour; the right was a derogation from British sovereignty over the Island, and the result of this division of the sovereignty was, it was claimed, that Britain had no independent right to regulate the fishery. The Court rejected this contention; the right, they thought, was



not a sovereign right but merely an economic one, and there was nothing in the treaty to show that the parties had intended it to be anything else. The Court did not actually say that servitudes are unknown to international law, but their language implies that that is what they thought; what they did say was that the right in this case was not a servitude. To have held that it would have meant that the benefit would pass by operation of law, if the case should arise, to a new sovereign over the territory of the United States, and the burden of it to a new sovereign over Newfoundland. It is purely fanciful to imagine that any such remote contingency as these was present in the minds of those who made the treaty.

That then is the test; in the terminology of English real property law the right must 'run with the land', and the difficulty of arriving at a decisive conclusion of the controversy is that the occasions which allow this test to be applied so rarely occur in international life, and that even when they do the answer is more likely than not to be wholly indecisive. A case upon which most of the writers<sup>1</sup> who believe in the existence of international servitudes place great reliance illustrates this difficulty. It was provided in the Treaty of Paris of 1815 that the Alsatian town of Huningue was never to be fortified. This arrangement was made in the interests of the Swiss Canton of Basle. When the treaty was made Huningue was

<sup>1</sup> See, for example, Oppenheim, *International Law*, 6th ed., vol. i, p. 493; Reid in *H.R.*, vol. xlv, p. 45.

French; in 1871 it became German; in 1919 French again. The facts are not altogether easy to ascertain, but it is said that neither France nor Germany ever fortified Huningue, and it is suggested that that proves the existence of a servitude which survived the changes of sovereignty. But, in fact, it proves nothing at all. Huningue may have been left unfortified for quite other reasons; very likely new conditions of warfare made the fortifying of it unnecessary. It does not prove that neither Germany nor France could legally have fortified it, nor that if, for example, Switzerland had been annexed by Italy, Italy would have had a right to insist on its non-fortification.<sup>1</sup>

No writer has satisfactorily explained how we are to distinguish a servitude from other rights that one state may have over the territory of another, for it is not suggested that all such rights are servitudes. For example, Britain had a right to keep troops on Egyptian territory, but this was clearly a merely contractual right, a right *in personam* not *in rem*. But what is it that distinguishes this right from that in the Huningue case or the North Atlantic Fisheries case? The only answer is that a servitude is intended to survive a change in the sovereignty. But do states ever have that intention when they make a treaty?

It seems probable that the notion of servitude has been introduced into the terminology of international law owing to the fact that the international rules relating to territory were in the main originally taken

<sup>1</sup> See the examination of the Huningue case by Professor Kelsen in *H.R.*, vol. xlv, p. 11. Also McNair in *B.Y.I.L.*, 1925.

from the Roman rules relating to the ownership of land. Thus the word came to be used loosely to denote merely rights held by one state over the territory of another. But if a right over territory does not have the character of being a right *in rem*, it is merely confusing to call it a servitude, for in legal analysis it does not differ from any other right created by a treaty.

#### § 4. *Territorial Waters*

Every state is entitled to regard a certain area of the sea adjacent to its coasts as its territorial waters, but neither the extent of this area nor its legal status is absolutely settled. We shall deal here with the extent of territorial waters, and with their status in the following chapter.

On the landward side territorial waters are generally measured from low-water mark, but bays and gulfs create an exception to this rule which will require separate consideration. The existence of islands off a coast also makes its application doubtful. The waters surrounding an island are, of course, territorial within the same distance as those that adjoin the mainland; but some states, for example, Norway, claim to measure their territorial waters from the outermost islands lying off their coasts, and to regard the waters between the islands and the mainland as internal waters. Such a claim seems not unreasonable where a large number of islands, like those which form the Norwegian fiords, are strung along a

coast at no great distance from the mainland; but the law on the point is not settled.

The seaward limit of territorial waters is less certain. The theory on which the law of territorial waters is often said to have been founded is that they extend to the range within which the sea can be commanded by gunfire from the land. The principle was thus laid down by Bynkershoek in his *De dominio maris* in 1702: *imperium terræ finitur ubi finitur armorum potestas*. Historically, however, this origin is probably mythical; a marine league was more or less generally accepted as the width at a time when the range of gunfire was much less than that. However, according to the British view, the distance became fixed in a definite rule of law about the end of the eighteenth century when the range of artillery was approximately one marine league, and it has not been changed, and cannot now be changed, merely by the increase in the range of artillery. Great Britain therefore adopts one marine league as the extent of her own territorial waters and she refuses to recognize any larger claims by other states. The United States takes the same view, and the Supreme Court has defined the phrase in the Eighteenth Amendment, 'the United States and all territory subject to the jurisdiction thereof', as meaning 'the land areas under its dominion and control, the ports, harbours, bays, and other enclosed areas of the sea along its coast, and a marginal belt of the sea extending from the coast-line outward a marine league'.<sup>1</sup> Germany also appears to agree

<sup>1</sup> *Cunard Steamship Company v. Mellon* (1923), 262 U.S. 100.

with this view, but other countries claim a greater extent—Spain, for example, six miles; and others claim to be entitled to fix for themselves different zones for different purposes. On this principle, sometimes called the doctrine of the 'Contiguous Zone', which is that upheld by France and Italy, there may be one zone within which fisheries are reserved; another within which measures for the protection of the customs may be taken; another which must be treated as neutral waters in time of war; another for securing the national safety. Great Britain has always resisted the doctrine of the Contiguous Zone, though some of the powers which we claimed in the Hovering Acts of the last century, for the protection of the customs, are difficult to reconcile with this attitude, and the Privy Council has referred to the Zone as having been long recognized for such purposes as police, revenue, public health, and fisheries; but this reference was not necessary to the decision and the matter was not fully argued before the Committee.<sup>1</sup> The theory underlying these claims is perhaps that within reasonable limits a state may fix for itself the extent of the waters over which it will claim jurisdiction, and therefore may fix different extents for different purposes; but it is not always clear in these cases whether a state is claiming a width of marginal sea exceeding three miles as its territorial waters, or whether it is satisfied with that limit and merely claiming certain special rights of jurisdiction *outside* its territorial waters. At the Hague Codification

<sup>1</sup> *Croft v. Dumphy* [1933] A.C. 156; *B.Y.I.L.*, 1933, p. 155.



Conference of 1930 no agreement on the matter could be reached. One argument in favour of a restricted limit lies in the fact, often overlooked by those who discuss the matter in the abstract, that the persons most concerned are the sailors who must try to observe whatever rule is adopted, and that to estimate the distance of a ship from the coast is never easy, and becomes harder the greater the distance from the land. On the other hand, there is no compelling reason why an agreement on the matter need involve a *uniform* distance irrespective of the configuration of a coast and the special interests of the coast state. Some part of the modern differences of view is due to the fact that a marine league was a different measure in different countries: for example, in the Scandinavian countries it seems to have been equal to four miles, and these countries still claim that distance as territorial.

The line from which territorial waters are measured ceases to follow the sinuosities of the coast when it reaches a bay or other indentation in the coast, both shores of which belong to the same state, and it crosses the waters of the bay from shore to shore. So much is generally admitted, but two important questions regarding bays remain: (i) what is the character of the waters on the landward side of this imaginary line drawn across the bay? and (ii) where is the line to be drawn?

The British view on the former of these questions is that these waters are not 'territorial' waters, but internal or national waters in the full sense. The

practical importance of this distinction is that there is no right of passage through internal waters. The principle of the Common Law was laid down by Lord Hale in the seventeenth century in these words: 'that arm or branch of the sea which lies within the *fauces terrae* where a man may reasonably discern between shore and shore is, or at least may be, within the body of a county'; and it was applied in 1859 in the case of *R. v. Cunningham*,<sup>1</sup> where an assault had been committed on a ship at anchor in the Bristol Channel, about two miles from land, and the Court held that it was properly charged as having been committed within the county of Glamorgan. The same view is maintained by the United States, and it does not seem to be expressly disputed by any state.

On the second question no exact rule can be laid down, but guidance may perhaps be derived from Lord Hale's suggestion that a bay is national territory when one can see across it from shore to shore. A moderate-sized bay may therefore be presumed to be national territory, and in some fishery conventions, e.g. the North Sea Fisheries Convention, 1882, a width of ten miles has been taken as the test. This width was also accepted by Great Britain and the United States in 1902, on the recommendation of the arbitrators, in settlement of their controversy about the North Atlantic Fisheries. We may perhaps say, therefore, that the line from which territorial waters are to be measured outwards will probably pass from headland to headland of any bay which is

<sup>1</sup> Bell's Criminal Cases, 86.

less than ten miles across at its entrance, and from approximately the points where the bay first narrows to ten miles when the entrance is wider than ten miles, but it cannot be said that this is a definite rule. Moreover, there are certain bays, sometimes called 'historic bays', much larger than this, which are certainly national territory. These cases also cannot be determined by any general rule. Most maritime states formerly made extensive claims of this kind, and it is not easy to know whether such claims would be pressed if they were challenged at the present day. England, for instance, has traditionally claimed the 'King's Chambers', or waters lying within an imaginary line drawn from headland to headland round the coast, and the United States has claimed Chesapeake and Delaware Bays. An important consideration is to inquire whether the coastal state has for a long period treated a bay as part of its territory and whether such an appropriation has been acquiesced in by other states; and it was largely on this ground that the Privy Council, in *Direct United States Cable Company v. Anglo-American Telegraph Company*,<sup>1</sup> which related to the right to lay a cable inside the Bay of Conception, which has an entrance twenty miles wide, held that the bay formed part of the territory of Newfoundland. In a later case, *The Fagerness*,<sup>2</sup> where the question was whether a tort committed in the Bristol Channel, at a point seven and a half miles from the nearest coast and where the Channel is about twenty miles wide, had been committed within

<sup>1</sup> (1877) L.R. 2 App. Cas. 394.

<sup>2</sup> [1927] P. 311.

the jurisdiction, the Attorney-General informed the Court of Appeal that the Crown did not claim the point as within the jurisdiction, and the action was dismissed on that ground. But the Court disclaimed any intention of laying down any general rule, and Lord Justice Atkin quoted with approval a passage in the arbitral award in the *North Atlantic Fisheries Case* enumerating considerations relevant to the character of bays:

'The interpretation must take into account all the individual circumstances . . . the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the state in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea, and other circumstances not possible to enumerate in general.'

Rather similar to these claims to historic bays are certain claims of states to areas of the bed of the sea outside the ordinary limits of territorial waters. For instance, oyster-beds as far as twenty miles off the east coast of Ireland were regulated by British Acts of Parliament, and sponge-banks in the open sea off Tunis have always been regarded as belonging to the Bey of Tunis. These claims probably depend for their justification on the effective appropriation of the areas in question. The same principle would justify the making of that part of a Channel tunnel that would not be under British or French territorial waters.<sup>1</sup>

<sup>1</sup> Cf. Hurst, 'Whose is the Bed of the Sea?', *B.Y.I.L.*, 1923-4.

There is little actual authority on the application of the rules regarding territorial waters to straits. If a strait is less than two marine leagues in width it is clearly territorial; but may it be so if it is wider than this? In other words, does a strait fall under the principle of the marginal belt, or under that of bays? Great Britain and the United States seem to have acted on the latter view in 1873, when they agreed on a boundary line which runs between Vancouver and the American coast in the middle of a strait varying in width from ten to twenty miles.<sup>1</sup>

The Dardanelles and the Bosphorus have long had a special status imposed upon them by treaty, and they are now regulated by the Montreux Straits Convention of 1936. Its chief provisions are these:

*Merchant vessels.* In time of peace, and in time of war when Turkey is not a belligerent, they enjoy complete freedom of transit and navigation. In time of war, when Turkey is a belligerent, those of a country at war with Turkey have no rights; those of a country not at war with Turkey enjoy freedom of transit and navigation on condition that they do not assist her enemy, but they must enter the Straits by day and follow a route indicated by the Turkish authorities. Turkey may also require merchant vessels to enter the Straits by day and to follow an indicated route if she considers herself threatened with imminent danger of war.

*Warships.* In time of peace smaller surface vessels enjoy freedom of transit, provided it is begun in day-

<sup>1</sup> Cf. Hall, *International Law*, p. 195.



light, and is preceded by notification to the Turkish Government, but there are limits on the aggregate tonnage of foreign warships that may be in transit, or that non-Black Sea Powers may have in the Black Sea, at any one time. Except for courtesy visits at the invitation of Turkey, only Black Sea Powers may send capital ships or submarines through the Straits, and then only in certain circumstances. In time of war, when Turkey is not a belligerent, neutral warships have the same rights as warships in time of peace; those of a belligerent may pass only to fulfil obligations arising out of the Charter of the United Nations or to assist a state which is the victim of aggression in virtue of a treaty of mutual assistance binding Turkey and concluded within the framework of the Charter. No hostile act may be committed, or belligerent right exercised, in the Straits. When Turkey is a belligerent, or if she considers herself threatened with imminent danger of war, the passage of warships is left entirely to her discretion.

#### § 5. *Territorial Air*

The First World War made suddenly evident the vital importance of the legal status of the air, and it showed the unpractical character of certain theories on the question which had hitherto received some support. According to one of these theories the analogy of the open sea ought to be applied to the air, and it should therefore be completely free; according to another there should be a lower zone of territorial air analogous to the territorial sea, and above that

the air should be free. The experience of the War, however, had made it certain that states would accept nothing less than full sovereignty over the air space superincumbent over their territory and territorial waters, and a Convention on Air Navigation which was concluded at Paris in 1919 confirmed this rule as the law. It follows that only by virtue of a treaty can one state enjoy rights in the air space over another state. In Great Britain effect was given to the Convention by the Air Navigation Act, 1920.

## VI THE JURISDICTION OF STATES

IN general, every state has exclusive jurisdiction within its own territory, but this jurisdiction is not absolute, because it is subject to certain limitations imposed by international law.<sup>1</sup> The term 'extritoriality' is commonly used to describe the status of a person or thing physically present on a state's territory, but wholly or partly withdrawn from the state's jurisdiction by a rule of international law, but for many reasons it is an objectionable term. It introduces a fiction, for the person or thing is in fact within, and not outside, the territory; it implies that jurisdiction and territory always coincide, whereas they do so only generally; and it is misleading because we are tempted to forget that it is only a metaphor and to deduce untrue legal consequences from it as though it were a literal truth. At most it means nothing more than that a person or thing has *some* immunity from the local jurisdiction; it does not help us to determine the only important question, namely, how far this immunity extends.<sup>1</sup> We shall here consider certain real and alleged limitations on the territorial jurisdiction of states.

<sup>1</sup> In *Chung Chi Chung v. The King*, [1939] A.C. at p 175, the Privy Council approved this criticism of the use of the term 'extritoriality'.

§ 1. *Jurisdiction in Territorial Waters*

The term 'territorial waters' implies that they are as fully part of the territory of a state as is its land territory, and although it was formerly suggested that the law recognizes only certain restricted rights of jurisdiction in the coastal state falling short of full sovereignty, it is now accepted that the only limitation on its sovereignty is the existence of a right of 'innocent passage' through those waters for the ships of other states. In time of peace states normally allow this right to be exercised by warships as well as other ships, but it is not settled whether warships enjoy it as of right, or only by sufferance.

The term 'innocent passage' accurately denotes the nature of the right as well as its limitations. In the first place it is a right of 'passage', that is to say, a right to use the waters as a thoroughfare between two points outside them; a ship proceeding through the maritime belt to a port of the coastal state would not be exercising a right of passage. In the second place the passage must be 'innocent'; a ship exercising the right must respect the local regulations as to navigation, pilotage, and the like, and, of course, it must not do any act which might disturb the tranquillity of the coastal state. That state therefore must be entitled to exercise *some* jurisdiction over ships in passage, but the extent of this is not altogether certain, and in particular there is some doubt how far the coastal state may enforce its own criminal or civil laws against persons on board a ship in passage.

In 1876 the English Court of Crown Cases Reserved had before it the case of the *Franconia*,<sup>1</sup> a German ship which had negligently collided with and sunk an English ship with loss of life at a point about two miles off Dover. The case was elaborately argued, and the judgements were numerous and lengthy. Some of these dealt with the international law on the matter, but the actual point for decision was one of English law, namely, the historical limits of the jurisdiction of the English Court of Admiralty. It was held by a majority that this jurisdiction had never extended to the point at which the collision had occurred, and consequently that there was no jurisdiction to try the commander of the *Franconia* for manslaughter. In consequence of this decision there was passed in 1878 the Territorial Waters Jurisdiction Act, which must be taken to express the British view of the extent of the criminal jurisdiction which international law allows states to assume in such a case. The Act gives jurisdiction to British Courts over any offence committed within territorial waters, but it provides that a foreigner is to be prosecuted only by leave of a Secretary of State. This extensive claim has been criticized in other countries; and certainly if the jurisdiction were habitually exercised, which in practice it is not, it would cause intolerable inconvenience to foreign ships in transit.

An incident involving civil jurisdiction arose in 1930 when a British vessel, the *Chief Capilano*, was arrested while in transit through American waters in

<sup>1</sup> *R. v. Keyn*, L.R. 2 Ex. D. 63.



respect of a claim which an American Corporation had against her owners.<sup>1</sup> The American Court released the vessel as having been unlawfully seized. The most reasonable rules on this matter (though they cannot be regarded as settled law) are perhaps those which have been suggested by the 'Harvard Research in International Law' in a draft convention prepared in anticipation of the Codification Conference of 1930:<sup>2</sup>

'A state may not exercise jurisdiction in respect of an act committed in violation of its criminal law on board a vessel of another state in the course of innocent passage through its marginal seas, unless the act has consequences outside the vessel and tends to disturb the peace, order or tranquillity of the state.

'A state may not exercise civil jurisdiction over a vessel of another state which is in course of innocent passage through the marginal sea, except in respect of an act committed by the vessel during the course of that innocent passage and not relating solely to the internal economy of the vessel.

'A state may exercise jurisdiction over a vessel of another state which is in its territorial waters for purposes other than innocent passage through its marginal sea to the same extent as over a vessel in port.'

### § 2. *Jurisdiction over Public Ships*

Public ships, at any rate if not engaged in commerce, are wholly exempt from the local jurisdiction;

<sup>1</sup> See *B.T.I.L.*, 1932, p. 125. The American-Panamanian Claims Commission has decided an apparently somewhat similar case, the *David*, in a contrary sense. See *A.J.I.L.*, 1933, p. 747, and 1934, p. 596.

<sup>2</sup> *Ibid.*, 1929, Special Supplement, pp. 297 et seq.

they may not be entered by the port authorities for any purpose whatsoever. This, so far as regards ships of war, has been generally accepted ever since the judgement of Chief Justice Marshall in the case of *The Schooner Exchange* in 1812.<sup>1</sup> But this does not mean that a public ship is under no duty to obey the law of the port, as is implied if she is described as 'extritorial'; on the contrary, she is bound to do so in any matter which has effects external to the ship herself. Thus, while she will observe her own law in a matter of ship's discipline, she must observe any quarantine regulations of the port; she must not give asylum to fugitive criminals, though it has been suggested, on grounds rather of humanity than of law, that she may receive political fugitives; if members of the crew break the law on shore they are not protected from the consequences, though the port authorities may, and often do, hand them over to the ship's authorities instead of dealing with the offence. The immunity of a public ship therefore means, not her total exemption from the local law, but her immunity from any kind of legal process or police action, and that if she violates that law the only proper method of redress is through diplomatic action.

This at any rate is the view which has been established as the British view by the decision of the Privy Council in the case of *Chung Chi Chiung v. the King*.<sup>2</sup>

<sup>1</sup> 7 Cranch, 116.

<sup>2</sup> [1939] A.C. 160. A British court would have had jurisdiction to try a British subject for murder, even if the crime had been committed abroad, but apparently a Hong Kong court cannot do so.

A British subject had been convicted in a Hong Kong court for murder committed on board a Chinese public ship within the territorial waters of Hong Kong. He had tried to commit suicide, and had been taken to hospital in Hong Kong. On appeal it was argued on his behalf that the court had had no jurisdiction, and if the true view of the character of a public ship were that it is 'extraterritorial', that is to say, really to be regarded as foreign territory, the argument would have been sound. The Privy Council, however, took the view that a public ship merely has certain immunities from the local jurisdiction, and that except to the extent that it is excluded by these immunities the local law applies to her and to everything happening on board. There could therefore be no legal objection to the immunities to which the ship was entitled being waived, and on the facts it was held that China had waived them. The Hong Kong court therefore had jurisdiction to try the case.

British practice has hitherto made no distinction between public ships engaged in commerce and others. In *The Parlement Belge* (1880) 5 P.D. 197, a Belgian mail ship had collided with an English ship in Dover Harbour, and although it was proved that the ship, the property of the King of the Belgians, was partly used by him for trading purposes, the Court held that it could not deal with the claim of the English owners. The American Supreme Court has given a decision in the same sense.<sup>1</sup> It may be, how-

<sup>1</sup> *S.S. Pesaro* (1926) 271 U.S. 562.

ever, that the rule is not definitely settled in either country. In *The Cristina*<sup>1</sup> three out of five law lords expressed *obiter* doubts about the correctness of the previous English decisions, and in the United States it seems possible that the decision in *The Pesaro* may not be followed. In any case it can hardly be said that international law requires immunity to be extended to public ships engaged in ordinary commercial undertakings; many states have never done so, and in recent years national trading has become so common that their exemption from the jurisdiction of national courts sometimes works gross injustice.<sup>2</sup> The abuse was dealt with at a conference held in Brussels in 1926, and a convention was formed of which the main provisions are: that vessels owned or operated by states, and their cargoes and passengers, are to be subject to the same liability in respect of claims as those privately owned; but ships of war and non-trading vessels may not be arrested or detained in a foreign port, and proceedings must be taken against them in the courts of the country to which they belong. The convention is not to apply in time of war. It is in force between a few states, but it has not been ratified by Great Britain.

### § 3. *Jurisdiction in Ports*

A private ship in a foreign port is fully subject to the local jurisdiction in civil matters, but there are two views of its position in criminal matters. That

<sup>1</sup> [1938] A.C. 485.

<sup>2</sup> See, for example, the *Porto Alexandre* [1920] P. 30.

followed by Great Britain asserts the complete subjection of the ship to the local jurisdiction, and regards any derogation from it as a matter of comity in the discretion of the territorial state. We regard the local jurisdiction as complete, but we do not regard it as exclusive; we exercise a concurrent jurisdiction over British ships in foreign ports, and are ready to concede it over foreign ships in British ports.

The other doctrine, is founded on an Opinion of the French Council of State in 1806, referring to two American ships in French ports, the *Sally* and the *Newton*, on each of which one member of the crew had assaulted another. Both the American consuls and the French local authorities claimed jurisdiction, and the Council held that it belonged to the consuls, on the ground that the offences did not disturb the peace of the port. The Opinion declared in effect that the ships were subjected to French jurisdiction in matters touching the interests of the state, in matters of police, and for offences committed, even on board, by members of the crew against strangers; but that in matters of internal discipline, including offences by one member of the crew against another, the local authorities ought not to interfere, unless either their assistance was invoked or the peace of the port compromised. This opinion effected an alteration in French practice, which had previously agreed with that still upheld by Great Britain, and although it has been followed in many continental countries it cannot be regarded as an authoritative declaration of the international law on the matter. It is, moreover, full of ambiguities. If



we are asked, for example, what matters 'touch the interests of a state', we should be inclined to answer that the whole administration of the criminal law does so very closely. Further, the Opinion says nothing of the position of passengers; it does not indicate the sort of incidents which ought to be regarded as 'compromising the peace of the port', nor by whom the point is to be decided; it does not say by whom (e.g. by a consul, by the master, by the accused, or by his victim) the assistance of the port authorities must be invoked in order to justify their interference; it does not even say whether this interference may take the form of assuming jurisdiction. The French courts indeed held, in 1859, when a ship's officer on board an American ship, the *Tempest*, had killed a seaman on the same ship, that some crimes are so serious that without regard to their further consequences, if any, their mere commission compromises the peace of the port, and therefore brings them under the local jurisdiction. Such a decision is sound sense, but difficult to support as an application of the Opinion of the Council of State; and, as M. Fauchille has pointed out, it leads to the result that everything but disciplinary and minor offences among the crew will fall under the local jurisdiction.<sup>1</sup>

This difference of view is, however, perhaps less than it appears. According to a recent French writer on the subject, M. Gidel,<sup>2</sup> the French system does not deny the complete jurisdiction of the state of the port

<sup>1</sup> *Traité*, vol. i, part ii, p. 1034.

<sup>2</sup> *Droit international public de la mer*, vol. ii, pp. 204 and 246.

over offences committed on board foreign ships; it merely declares that this jurisdiction will not be exercised in certain cases which it indicates. The English system likewise does not involve the invariable exercise of jurisdiction, but it does not declare in advance in what cases the jurisdiction will or will not be exercised. He holds therefore that the state of the port is as a matter of law within its rights in dealing with any offence against its own laws (a term which would exclude most purely disciplinary infractions) committed on board a foreign ship; that in practice this absolute territorial competence is not exercised, for reasons of general policy and expediency; and that certain states like France have, and others like Great Britain have not, announced in advance the line they will take in these matters.

The difference referred to above relates only to the question of jurisdiction over offences committed by members of the crew on board a merchant vessel. There is almost universal agreement that a merchant vessel may not afford asylum to a fugitive from justice, and such a fugitive may, if necessary, be removed from the ship, though as a matter of courtesy it is usual to inform the consul of the state concerned of the intended arrest.

A ship may have occasion to put into a foreign port when she has on board persons in custody which is legal by the law of her state. Can such persons claim their liberty on the ground that they have committed no offence against the law of the state into whose port they have been brought?

A French ship, the *El Kantara*, put into the port of Newcastle, N.S.W., in 1922, having on board two prisoners *en route* to a French penal settlement. The prisoners escaped; the ship left without them; and they were later arrested and handed over to another French ship. Just before this latter ship sailed, an application for a *habeas corpus* rule was made to the Australian Court, but refused on the ground that there was no *prima facie* evidence to suggest that their custody was not legal by French law.<sup>1</sup> The decision implies that the courts of the port state may inquire into the regularity of the custody of a person on board a foreign ship, and, if necessary, release him; but that they will not interfere with a custody which appears to be regular by the law of the ship. Any other conclusion would be highly inconvenient.

#### § 4. *Jurisdiction over the Air*

We have seen<sup>2</sup> that states have sovereignty over the air space above their territories, and that other states have only such rights in it as are secured to them by convention. There are two competing interests which a satisfactory state of the law would reconcile as far as possible, that of the subjacent state in its own security, and that of all states in the greatest possible freedom of communications. Of the two the interests of security have been preferred in the present law. But attempts have been made, not yet wholly success-

<sup>1</sup> Cf. Charteris, in *Journal of Comparative Legislation*, 1926, p. 246, and on the subject of this section generally cf. the same writer in *B.Y.I.L.*, 1920-1, p. 45.

<sup>2</sup> *Supra*, p. 171.

fully, to facilitate the use of the air as a medium of international communication.

In the Convention of Paris on Air Navigation of 1919 each of the parties undertook in time of peace to accord freedom of innocent passage in the air above its territory to the aircraft of the other contracting parties without distinction of nationality subject to the conditions laid down in the Convention. Aircraft must carry certificates of airworthiness and other prescribed documents; prohibited zones might be established in the interests of national security, provided that the prohibition was also applied to domestic aircraft; routes and landing-places might be prescribed; and the prohibition of the transport of persons or goods between two points in a state's territory, that is to say, the practice which in sea navigation is called *cabotage*, was authorized. But the establishment of 'international airways' was to be subject to the consent of the states flown over. Military aircraft might fly over foreign territory only by special permission. The Convention also contained comprehensive regulations dealing with registration of aircraft, certificates of airworthiness, and other technical matters, and it set up an International Commission of Air Navigation to act as a clearing-house for information on air navigation questions, to decide differences of a technical character, and having power, by a three-quarters vote of all the members, to amend some of the technical provisions of the Convention.

As the importance of civil aviation increased, a

tendency arose for states to use their sovereignty over the air for securing advantages to themselves. They have, for instance, used the right of prescribing routes and security zones and their control of landing-grounds as a means of whittling away their obligation to allow innocent passage to foreign aircraft, and the omission of the Convention to regulate international airways that is to say, regular airline services, created a very important exception to the right of innocent passage which the Convention purported to allow.

In 1944 a conference met at Chicago and attempted to reach agreement on a number of outstanding problems, the urgency of which had been immensely increased by the developments in aviation during the war. It created an International Civil Aviation Organization (I.C.A.O.) with headquarters at Montreal. This has an annual Assembly consisting of all the members, a smaller Council meeting more often, and a secretariat, and it has been accepted by the United Nations as a 'Specialised Agency'. On the technical side the Chicago Conference and I.C.A.O. have been very successful, but much less so on the economic side. Discussion centres on the so-called 'five air freedoms', namely, freedom to fly across foreign territory without landing, to land for non-traffic purposes, e.g. to refuel, to put down traffic originating in the state of the aircraft, to embark traffic destined for that state, and to embark traffic destined for, or to put down traffic coming from, a third contracting state. On the question



which of these freedoms should be accepted there is a cleavage of opinion which it has hitherto been impossible to bridge between states which favour the creation of a central control authority to apportion the world's air traffic equitably between the different states and those which favour free competition. Among the latter the United States, which at present operates more than sixty per cent. of the world's traffic, is the leading state. At present, therefore, regular airline services are made possible only by a complicated network of bilateral agreements.

#### § 5. *Jurisdiction over Inland Waterways*

When the whole course of a river and both its banks are within the territory of a single state, that state's control over the river is as great as over any other part of its territory, unless its rights have been limited by treaty. The only rivers, therefore, which concern international law are those which flow either through, or between, more states than one. Such rivers are conveniently called 'international rivers'; and they raise the question whether each of the riparian states has in law full control of its own part of the river, or whether it is limited by the fact that the river is useful or even necessary to other states. One obviously important interest at stake is that of navigation; it may be of vital concern to an up-river state that states nearer the mouth should not cut off its access to the sea; and it may also be important to non-riparian states to have access to the upper waters of the river. But in recent years the economic uses of

rivers, for such purposes as irrigation, the supply of water to large cities, and the generation of hydro-electric power, have become increasingly more important.<sup>1</sup> It is obviously desirable that all these interests should, so far as possible, be effectively protected.

From early in the seventeenth century treaties between particular states opening particular rivers began to be common; but it was not until the Treaty of Paris in 1814 that a general declaration of freedom of navigation on all international rivers was proclaimed. The declaration was given only a limited effect, though in the course of the next forty years many rivers were opened to riparian states, but there was a tendency to exclude non-riparian states. After the Crimean War, however, the Treaty of Paris, 1856, introduced a new principle. It set up a body called the European Danube Commission, consisting of representatives both of riparian and non-riparian states, to improve the conditions of navigation on the lower Danube. The Commission was intended to be temporary, but its duration was extended and its powers enlarged by successive treaties. When it was instituted, navigation on the Danube was chaotic; the stream was obstructed by shoals, piracy and wrecking were common, extortionate dues were charged. The Commission altered all this, and proved a most successful experiment in international co-operation. It had wide administrative powers to the exclusion of the sovereignty of the territorial

<sup>1</sup> Cf. H. A. Smith, *Economic Uses of International Rivers*.

states through which the river flows; controlled and policed navigation, fixed dues, constructed works, and tried offences against its own regulations. After 1921 there were two Commissions: the European Commission regulating the Danube from Braila to the Black Sea and consisting of representatives of Great Britain, France, Italy, and Rumania only; and the International Commission for the upper parts of the river which included representatives of many other states.

At the present time, however, the future of these arrangements is uncertain. In a Conference at Belgrade in 1948 the U.S.S.R. and her satellite states have purported to set up a new Commission from which non-riparian states are to be excluded. The United Kingdom, the United States, and France have refused to recognize this new body.

After the Treaty of Paris, 1856, the principle of free navigation for all states made some further progress. It was extended to the Rhine, with some qualifications in favour of the riparian powers, by the Convention of Mannheim, 1868; and the African Conference of Berlin in 1885 applied it to the Congo and the Niger.

The Peace Treaties of 1919 dealt with the most important rivers flowing through the ex-enemy countries, creating international commissions for some of them, and establishing on all of them equal treatment for all states.<sup>1</sup> The work was carried on by the League of Nations at the Barcelona Transit Confer-

<sup>1</sup> Germany denounced these provisions in 1936.

ence in 1921. The two most important of the Barcelona conventions were: (1) A Statute on 'navigable waterways of international concern', laying down general principles, which were intended to be applied in detail to all international rivers by separate conventions, providing for free navigation for all the contracting states, imposing the duty of maintaining the river on the riparian states, and limiting the charges that might be levied to the expenses of maintenance; a voluntary protocol was annexed, by which states might reciprocally agree to open their own national rivers or canals to other states. (2) A Statute on 'freedom of transit', applying to transit of persons or goods through a state either by water or rail. Such transit was to be facilitated without distinction of nationality, and without charging dues except for certain administrative expenses.

Most river commissions, however, did not follow the Danube model; their powers were narrower. The typical functions of such a commission have been thus stated:<sup>1</sup> to supervise the application of the régime established for the river; to serve as a sort of standing conference of the parties; to take certain decisions, within the ambit of its powers, relating to works, dues, and technical services, such decisions binding the states affected, but being matters for the states, and not for the commission itself, to execute; sometimes to act as a court of appeal in cases of alleged breaches of the convention; to serve as an organ of liaison for

<sup>1</sup> Cf. Hostie, in *Recueil des cours de l'Académie de droit international*, vol. xl, p. 438.

the exchange of information, co-ordination of statistics, and the like; and as an organ of conciliation and sometimes of arbitration, in differences between the states.

Navigation, however, is only one of the uses to which the waters of a river may be put, and not always, as, for instance, in the case of the Nile, the most important. The law relating to the other uses of rivers, and indeed the customary law relating to rivers generally, is still in an early stage of development, for the problems, or at any rate many of their important factors, are of recent growth. Professor H. A. Smith, in the book already referred to, has called attention to certain considerations which the student of this branch of the law should bear in mind. He points out the danger of trying to deduce the actual law from some assumed general principle, such as the absolute rights of the territorial sovereign, or a natural right of free navigation, or the priority of the interests of navigation over other interests.

'A great river system is an extremely complex thing, in which many states, riparian and non-riparian, may have many and varied interests. These interests may be political, strategic, or economic, and it is obvious that in many cases they may conflict. The function of law is to provide rules for regulating the possible conflict of interests, and in practice it always achieves this end by trying to strike an equitable balance between them' (p. 12).

It cannot be said that international law has as yet discharged this function, but it has perhaps made a beginning. The practice of states, as evidenced in the



controversies which have arisen about this matter, seems now to admit that each state concerned has a right to have a river system considered as a whole, and to have its own interests weighed in the balance against those of other states; and that no one state may claim to use the waters in such a way as to cause material injury to the interests of another, or to oppose their use by another state unless this causes material injury to itself. This principle of the 'equitable apportionment' of all the benefits of the river system between all the states concerned is clearly not a single problem which can be solved by the formulation of rules applicable to rivers in general; each river has its own problems and needs a system of rules and administration adapted to meet them. The way of advance seems therefore to lie, as Professor Smith suggests, in the constitution of authorities to administer the benefits of particular river systems. One such authority, the International Joint Commission, was created for the 'boundary waters' between the United States and Canada by a treaty of 1909. It consists of three commissioners from each side, and it has jurisdiction to decide applications for 'the use or obstruction or diversion' of the boundary waters as defined in the treaty. Other questions may be submitted to it by either government for examination and an advisory report, and under this head it has reported on the vast project for a deep waterway via the St. Lawrence to the Middle West of America. The work of the Commission has been efficiently and smoothly performed.

In the absence of treaty stipulations a canal is subject to the sole control of the state in whose territory it lies, and there is no right of passage through it for the ships of other states. But three interoceanic canals, Suez, Panama, and Kiel, have received a special status. They are sometimes but inaccurately said to be 'neutralized', or 'internationalized'.

The Suez Canal lies in Egyptian territory; it is owned by a French company in which the British Government is the largest shareholder. It was opened in 1869 under a concession which is to run for ninety-nine years and then revert to the Egyptian Government. The present status of the canal rests on the Convention of Constantinople, 1888, to which all the great European powers and some others were parties; but the duration of the Convention is not limited to that of the company's concession.

The canal is to be open in war and in peace to every vessel of commerce and war, without distinction of flag. It is never to be blockaded (Art. 1); no act of war is to be committed in the canal or within three miles of its ports of access (Art. 4); belligerent warships must pass through with the least possible delay and may not stay more than 24 hours at Port Said or Suez; and an interval of 24 hours must elapse between the sailing of two hostile ships from these ports. The defence of the canal was committed to Turkey and Egypt (Art. 9), but this provision broke down when Turkey attacked the canal in 1914, and under the Peace Treaties Great Britain was substituted for Turkey. The Anglo-Egyptian Treaty of Alliance of

1936, the revision of which is now under consideration, allows British forces to be stationed in Egyptian territory for the defence of the canal.\*

The Panama Canal runs through a zone of Panamanian territory which is occupied and administered by the United States. It is regulated by no general international convention, but the United States, which constructed and maintains it, is under the obligations of two treaties with regard to it, the Hay-Pauncefote Treaty of 1901 with Great Britain, and the Hay-Varilla Treaty of 1903 with Panama.

By the Hay-Pauncefote Treaty she bound herself to accept certain rules, taken in the main from the Suez Canal Convention, as the basis of the so-called 'neutralization' of the Canal. Article 3 provided that

'The canal shall be free and open to the vessels of commerce and war of all nations . . . on terms of entire equality so that there shall be no discrimination against any such nation or its citizens or subjects in respect of conditions or charges of traffic or otherwise. Such conditions or charges of traffic shall be just and equitable.'

Provisions that the canal is never to be blockaded, that no act of war is to be committed within it, though the United States may maintain military police for its protection, as to the transit of belligerent ships, and other matters follow practically the terms of the Suez Convention.

The Kiel Canal was, by the Treaty of Versailles, to be 'free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality'. Germany was bound to maintain it

in navigable condition, and to levy only such charges as were necessary for this purpose. The future of these provisions will be determined when a peace treaty is concluded with Germany.

§ 6. *Immunities of Foreign Sovereigns and of Diplomatic Persons*

Reference has already been made to the immunities enjoyed by foreign public ships,<sup>1</sup> but the immunities of a foreign sovereign are not confined to ships. There are, at any rate in the British view, two distinct rules on the matter: (1) that a foreign sovereign cannot be impleaded in any legal proceedings either against his person or for the recovery of specific property or damages, and (2) that property which he owns or which is in his possession or control cannot be seized or detained by legal process, whether he is a party to the proceedings or not. These rules were laid down by the House of Lords in the case of the *Cristina*,<sup>2</sup> a Spanish ship which had put in at Cardiff during the Spanish Civil War and had been taken possession of by the Spanish consul on behalf of the Spanish Republican Government. The owners had issued a writ *in rem* claiming possession of the ship, but on the motion of the Spanish Government, which had entered a conditional appearance to the writ, it was set aside. The same principle was applied to a government to which Great Britain had given *de facto* recognition only in another case during the Spanish Civil War, the *Arantzazu Mendi*.<sup>3</sup> Here the Republican

<sup>1</sup> *Supra*, p. 176.

<sup>2</sup> [1938] A.C. 485.

<sup>3</sup> [1939] A.C. 256.

Government had issued a writ *in rem* claiming possession of a ship which they purported to have requisitioned, but which was being held by its master to the orders of the Government of General Franco. The Court was informed by the Foreign Office that we recognized the Franco Government as in *de facto* administrative control of the greater part of Spain including Bilbao, which was the ship's port of registry, and though the terms of this statement were rather equivocal the Court interpreted it to imply a *de facto* recognition of that Government and the writ was set aside.

This case also illustrates the British practice by which our courts accept the statement of a Secretary of State that the King recognizes the sovereign status of a party before the Court without inquiring whether international law would regard that party as a sovereign; they could not, for example, entertain an action for breach of promise against one of the ruling princes of Malaya, although internationally the defendant was certainly not a sovereign ruler. But this reliance on a statement by the executive is tolerable only on the assumption that in informing the Court a government department discharges the function which the law entrusts to it with candour and fairness to the parties concerned, as indeed it generally does. The case of the *Duff Development Company v. Kelantan Government*, however, was an exception. Kelantan is a protected Malay State, having no relations with foreign powers except through Great

<sup>1</sup> *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149.



Britain, and in internal administrative matters bound to accept the advice of a British resident. The litigation arose out of an agreement between the Company and the Kelantan Government, which had been made on its behalf by the Crown Agents for the Colonies in London. Disputes having arisen and been submitted by agreement to arbitration, and an award having been given for the Company which directed the Government to pay costs, the Government applied to the courts to set aside the award for error in law, and this application was dismissed with costs in all the courts up to the House of Lords.<sup>1</sup> Meantime the Company obtained a garnishee order attaching certain moneys of the Government in the hands of the Crown Agents for the recovery of their costs, and the Government applied to set aside this order on the ground that Kelantan was an independent sovereign state. In answer to the Court's request for information as to the status of Kelantan the Secretary of State for the Colonies then informed it that Kelantan was an independent state in which Great Britain neither exercised nor claimed any right of sovereignty or jurisdiction; and though it is difficult to see what meaning such words as independence, sovereignty, or jurisdiction had in the context, the House of Lords, to which this application, too, had been carried, held that this must be conclusive of the sovereign status of Kelantan. They also held that for the submission of a sovereign to the jurisdiction to take effect as a waiver of immunity it must be made

<sup>1</sup> [1923] A.C. 395.

at the moment when the jurisdiction is invoked; neither the original submission to the arbitration proceedings nor the subsequent application to set aside the award was material, and the award therefore could not be enforced.<sup>1</sup>

The facts in the Kelantan case are startling, showing, as they do, the risk of serious injustice to private litigants which is involved in the view that English courts take of the extent of the immunity. But the fault in that case did not lie with the courts, and it is probable that the rule of complete immunity is a more workable rule than any other. Some states, e.g. Belgium, distinguish between acts done in a sovereign and those done in a non-sovereign capacity, but this distinction is necessarily to some extent arbitrary and uncertain.<sup>2</sup> Others, e.g. Italy, are apparently ready to infer a voluntary submission to the jurisdiction from equivocal acts such as the making of contracts within the jurisdiction, but there are dangers in acting on a merely 'constructive' submission. The real justification for the rule of the complete immunity of states from the jurisdiction of a foreign court, except in the event of a submission which is not only *real*, but is also made in the proceedings actually before the court, is that, generally speaking, the courts of one state cannot coerce another, nor, for reasons of public policy, is it desirable that they should try.

<sup>1</sup> [1924] A.C. 797.

<sup>2</sup> Cf. Fitzmaurice, 'State Immunity from Proceedings in Foreign Courts', *B.T.I.L.*, 1933, p. 101.

The early history of the law relating to diplomatic privileges is the subject of a valuable study by Professor E. R. Adair.<sup>1</sup> He points out that the status of foreign envoys was formerly a topic of great practical importance, as is shown by the amount of literature and the number of international incidents to which it gave rise. When a foreign envoy might be the centre of a treasonable plot, it was a matter of public importance to know the extent of his immunity from criminal process; and when he might be a man of no substance, perhaps with his salary in arrear, it was even a matter of popular interest to know how far his immunity from civil process would enable him to swindle the people among whom he lived. In these respects at least international manners have improved, or at least until recently they seemed to have, and the law of diplomatic privileges is no longer a branch of the first importance.

In Great Britain the immunities granted to a foreign diplomatic person rest partly on the Common Law and partly on the Diplomatic Privileges Act, 1708. In some respects British practice probably goes beyond what international law requires, but it is difficult to state precisely what those requirements are, both because the practice of different countries differs in detail both as to the extent of the immunities and the persons to whom they apply, and also because it is sometimes uncertain whether a particular immunity which it may be usual to allow is a matter of law or of courtesy.

<sup>1</sup> *Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries.*

A diplomatic person is wholly exempt from criminal proceedings and from police action in the country to which he is accredited. \* This does not mean that it is not his duty to obey the criminal law or police regulations of the country, but that if he does not do so the only action that may be taken against him is a diplomatic complaint to his government, or, in an extreme case, his expulsion. It is possible to imagine cases of serious crimes which could only be met by the application of restraint to his person, but it is unnecessary to discuss whether such cases form a legal exception to his general immunity.

He is also exempt from civil proceedings, even from being required to give evidence in a court of law. On one view this immunity is limited to proceedings which might interfere with the conduct of his official duties; it would not extend, for example, to proceedings in respect of a private business in which he might be engaged; but the general modern practice is to treat the immunity as complete, unless he voluntarily submits to the jurisdiction. In Great Britain the terms of the Act of 1708 are vigorous and far-reaching on this point; all writs whereby the person of an ambassador may be arrested or his goods seized are null and void, and any person presuming to sue forth such a writ and all officers executing it 'shall be deemed violators of the laws of nations and disturbers of the publick repose'. But if a diplomatic person has submitted to the jurisdiction, there is no doubt that the Courts may assume it, as in *re Suarez*,<sup>1</sup>

<sup>1</sup> [1918] 1 Ch. 176.

where a claim was made against the ex-minister of Bolivia, and the Court of Appeal, dealing with the argument that a waiver of privilege would be invalid unless the government of the privileged person had consented to it, declared that they must assume that in waiving his privilege such a person was acting in accordance with his instructions. But even voluntary submission to the jurisdiction will not enable the orders of the court to be enforced against the diplomatic person by the ordinary forms of process.

That the essence of the diplomatic privilege is immunity from *enforcement* of the local law so long as the privilege lasts and not immunity from the application of the law is well illustrated in a recent English case.<sup>1</sup> The plaintiff had been injured by the car of the defendant, who was a secretary in the Peruvian Legation. The defendant did not plead his diplomatic immunity, but served a third-party notice on his insurance company, demanding that they should indemnify him against the claim. The company having repudiated liability on the ground that the defendant himself was under no legal liability to the plaintiff, the Court held that diplomatic agents are not immune from legal liability, but merely not liable to be sued unless they submit to the jurisdiction. Judgement against the defendant therefore created a legal liability against which the company had agreed to indemnify him.

A diplomatic person has some immunity from taxation, but the extent of this varies under different

<sup>1</sup> *Dickinson v. Del Solar*, [1930] 1 K.B. 376.



systems of taxation. For instance, in Great Britain the tax deducted at the source on a British investment would not be repaid to him. On the other hand, a diplomatic salary should certainly not be taxed, and customs duties are not usually charged on articles imported for his personal use. In any case, the payment of a tax by a diplomatic person could never be enforced.

The residence of a diplomatic person is in ordinary circumstances inviolable. If it should be necessary to arrest in a legation some person not himself immune from arrest, the proper course is to ask the minister to surrender him or to consent to the arrest; and it is the minister's duty to accede to such a request, since he may not turn his residence into an asylum for fugitives from the local justice. Still less may he himself assume powers of jurisdiction within the legation; thus in 1896 when Sun Yat Sen, then a political refugee from China, had been induced to enter the Chinese Legation in London and was detained there in order to be sent to China, the British Government refused to accept the minister's contention that the Legation was Chinese territory, and peremptorily demanded his release, which was granted.

The immunities of a diplomatic agent extend to his family and suite, and it is usual to deposit with the Foreign Office a list of those for whom they are claimed. Practice varies as to the immunity of the servants of a diplomatic agent, not being members of his official staff. In England domestic servants are expressly

protected from civil proceedings by the Act of 1708, unless they engage in trade, but they are probably not exempt from criminal jurisdiction.

An English court will not receive evidence of the character of a person claiming diplomatic status, but will accept a statement on the matter from the Foreign Office as conclusive.<sup>1</sup> The names of those persons for whom the status is claimed are submitted to the Foreign Office, and if accepted they are included in a published list.<sup>2</sup>

The immunities of a diplomatic person, whatever they may be, continue after he has ceased to hold his office until he has had a reasonable time in which to leave the country.<sup>3</sup>

Consuls are not diplomatic agents; they perform various services for a state or its subjects in another state, without, however, representing the former in the full sense. They may be nationals of either state, and generally they are made subject to the authority of the diplomatic representative of the state for which they act. They watch over commercial interests of the state for which they act; collect information for it; help its nationals with advice, administer their property if they die abroad, and register their births, deaths, and marriages; they authenticate documents for legal purposes, take depositions from witnesses, visa passports, and the like. They also have important

<sup>1</sup> *Engelke v. Musmann*, [1928] A.C. 433.

<sup>2</sup> Under the Diplomatic Privilege (Extension) Acts of 1944 and 1946 certain immunities may now be conferred on officials of international organizations of which the United Kingdom is a member.

<sup>3</sup> *Musurus Bey v. Gadban*, [1894] 2 Q.B. 352.

functions concerned with shipping, sending home, for instance, shipwrecked or destitute persons, and settling disputes between master and crew. Their immunities are indefinite, and exist by courtesy or by special conventions between particular states rather than by rules of law. They are generally exempted from direct taxation and from service on juries; but they are not immune from civil or criminal proceedings, though there is a general sentiment that, if possible, these should not be allowed to interfere with their official duties, or with the inviolability of the archives of the consulate. In certain non-Christian states, consuls exercise both civil and criminal jurisdiction over their own countrymen and enjoy the privileges of diplomatic persons under the treaties known as 'Capitulations'. The powers of British consuls in this respect are regulated by the Foreign Jurisdiction Act, 1890.

#### § 7. *Jurisdiction over Aliens*

No state is legally bound to admit aliens into its territory, but if it does so it must observe a certain standard of decent treatment towards them, and their own state may demand reparation for an injury caused to them by a failure to observe this standard. The legal basis of such a demand, in the words of the Permanent Court, is that

'in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect

for the rules of international law. This right is necessarily limited to the intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.<sup>1</sup>

There is a certain artificiality in this way of looking at the question. No doubt a state has in general an interest in seeing that its nationals are fairly treated in a foreign country, but it is an exaggeration to say that whenever a national is injured in a foreign state, his state as a whole is necessarily injured too. In practice, as we shall see, the theory is not consistently adhered to; for instance, the logic of the theory would require that damages should be measured by reference to the injury suffered by the state, which is obviously not the same as that suffered by the individual, but in fact the law allows them to be assessed on the loss to the individual, as though it were the injury to him which was the cause of action. The procedure, too, is far from satisfactory from the individual's point of view. He has no remedy of his own, and the state to which he belongs may be unwilling to take up his case for reasons which have nothing to do with its merits; and even if it is willing to do so, there may be interminable delays before, if ever, the defendant state can be induced to let the

<sup>1</sup> *Panevezys-Saldutiskis Railway Case*, Series A/B 76, p. 16.

matter go to arbitration. Delay, besides being unjust to the claimant, creates difficulties in securing satisfactory evidence, and also often leads to the original claim being exaggerated beyond all recognition; it could be avoided if some rule in the nature of a statute of limitations could be established for claims of this kind, but that would only be reasonable if provision existed for disposing of them by some regular procedure. It has been suggested that a solution might be found by allowing individuals access in their own right to some form of international tribunal for the purpose, and if proper safeguards against merely frivolous or vexatious claims could be devised, that is a possible reform which deserves to be considered. For the time being the prospect of states accepting such a change is not very likely.

These claims are one of the most fertile sources of controversy among states, and a large part of the time of the legal department of every foreign office is taken up with dealing with them. They are also particularly suitable for judicial settlement, and there already exists a great volume of case law upon them. But in the absence of a regular procedure for dealing with them the rules by which they ought to be determined have been obscured, both by the tendency of the stronger powers to press the claims of their nationals without much regard to legal justification, and by that of the weaker powers to try to avoid responsibilities for corrupt or incompetent administration by exaggerated emphasis on the rights supposed to be inherent in their independent status.



In general a person who voluntarily enters the territory of a state not his own must accept the institutions of that state as he finds them. He is not entitled to demand equality of treatment in all respects with the citizens of the state; for example, he is almost always debarred from the political rights of a citizen; he is commonly not allowed to engage in the coasting trade, or to fish in territorial waters; he is sometimes not allowed to hold land. These and many other discriminations against him are not forbidden by international law. On the other hand, if a state has a low standard of justice towards its own nationals, an alien's position is in a sense a privileged one, for the standard of treatment to which international law entitles him is an objective one, and he need not, even though nationals must, submit to unjust treatment. This statement of the law is denied by certain Latin-American states, which hold that if a state grants equality of treatment to nationals and non-nationals it fulfils its international obligation; but such a view would make each state the judge of the standard required by international law, and would virtually deprive aliens of the protection of their own state altogether. Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civiliza-

tion.<sup>1</sup> As Hall<sup>2</sup> points out, international law itself is a product of the special civilization of modern Europe, and reflects the essential facts<sup>3</sup> of that civilization so far as they are fit subjects for international rules; and among those facts is the existence in most states of a municipal law, consonant with modern European ideas, and so administered that foreigners may obtain criminal and civil justice from it. A state professing to be subject to international law is bound to furnish itself with such a system. The rule therefore that an alien must accept the institutions of a foreign state is qualified by the requirement that those institutions must conform to the standard set by international law; and if an alien suffers injury in person or property through the failure of a state to conform to that standard, his own state may prefer a claim to reparation on his behalf.

This international standard cannot be made a matter of precise rules. It is the standard of the 'reasonable state', reasonable, that is to say, according to the notions that are accepted in our modern civilization. It was thus described by the American-Mexican Claims Commission:<sup>3</sup>

'the propriety of governmental acts should be put to the test of international standards, and . . . the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage; to bad faith, to wilful neglect of duty, or to an insufficiency of govern-

<sup>1</sup> Opinions of U.S.-Mexican Claims Commission, *Roberts' case*, at p. 105.

<sup>2</sup> *International Law*, 8th ed., pp. 59-60.

<sup>3</sup> Opinions of Commissioners, *Neers' case*, at p. 73.

mental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.<sup>3</sup>

The standard therefore is not an exacting one, nor does it require a uniform degree of governmental efficiency irrespective of circumstances; for example, measures of police protection which would be reasonable in a capital city cannot fairly be demanded in a sparsely populated territory, and a security which is normal in times of tranquillity cannot be expected in a time of temporary disorder such as may occasionally occur even in a well-ordered state. But the standard being an international one, a state cannot relieve itself of responsibility by any provision of its own national law. Thus the central government of a federal or other composite state may be *constitutionally* unable to secure that justice is rendered to an alien by the authorities of a member state or of a colony, but if the central government is the only government which has relations with other states its *international* responsibility is not affected by the domestic limitation of its own powers.

It is ordinarily a condition of an international claim for the redress of an injury suffered by an alien that the alien himself should first have exhausted any remedies available to him under the local law. A state is not required to guarantee that the person or

property of an alien will not be injured, and the mere fact that such an injury has been suffered does not therefore of itself give his own state a right to demand reparation on his behalf. If the state in which the injury occurs offers him a proper remedy, it is only reasonable that he should be required to take it. This rule of 'the exhaustion of local remedies', however, must be reasonably interpreted.<sup>1</sup> For example, in the case of *Robert E. Brown* already referred to,<sup>2</sup> the Court, referring to the argument that the claimant had not exhausted all the judicial remedies open to him, quoted with approval the statement of Secretary of State Fish in 1873 that 'a claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust'. Apart from extreme cases like this there are certain wrongs for which it is not unusual to find that the local law provides no remedy, for example, the wrong may have been committed by the legislature itself, or by some high official whose acts are not subject to review. Again, the rule is not a mechanical formula, and it probably does not require proceedings to be taken in the local courts when it is morally, even though not formally, certain, that they will lead to no redress; for example, it may be clear that the local courts are bound by their own precedents to deny the claim. The justification of the rule is obvious; it is right that a state should have a full and proper opportunity of doing justice itself before justice is demanded of it by

<sup>1</sup> Cf. Borchard in *A.J.I.L.*, 1934, p. 729.

<sup>2</sup> *Supra*, p. 141.

another state. But in practice the rule is often excluded in agreements for the submission of claims to arbitration, possibly, as Professor Borchard suggests, because states are reluctant to raise the delicate questions involved in an allegation that justice has been 'denied' by the defendant state, as they would often be driven to do if as a preliminary condition of the claim they must show that justice has been sought.

Another condition is that the injury in respect of which a claim is preferred must have been suffered by a national of the claimant state,<sup>1</sup> and if, as often happens, the beneficial interest in the claim has passed from the person originally injured to someone else, it is probably also necessary that it should have been continuously vested in some national of the claimant state from the date of the injury down to the date of the award.

A state may incur responsibility by the act or omission of any of its organs, legislative, executive, or judicial, but these cases require separate consideration. As an example of legislative action towards an alien in violation of international law may be cited the Costa Rican law, already referred to,<sup>2</sup> nullifying contracts made by the *de facto* government of Tinoco. In recent years difficult questions have been raised by legislation in certain states expropriating private property without compensation. There is no doubt that such a measure directed against the property of aliens as such would violate international law, but if it is

<sup>1</sup> See Hurst, 'Nationality of Claims', in *B.Y.I.L.*, 1926.

<sup>2</sup> *Supra*, p. 129.



applied for some public purpose without discriminating either avowedly or in fact between nationals and aliens the matter is less clear.<sup>1</sup> The precedents are indecisive; but it is submitted that Sir John Fischer Williams is right in concluding that there is not, nor is it desirable that there should be, any absolute rule forbidding the taking of an alien's property by a state without compensation. The sanctity of private property may be in general a sound maxim of legislative policy, but it is difficult in these days to hold that it may in no circumstances be required to yield to some higher public interest. 'Whatever may be our views as to the relative merits of socialist and individualist doctrines, it is impossible to assert that modern civilization requires all states to accept unreservedly the theories of one side in the great economic conflict.'

In certain circumstances the wrongful act of an official may involve his state in responsibility to the state of an injured alien. In the first place the official must have acted within the scope of his office; otherwise his act would be like that of a private individual. Secondly, a state has a higher responsibility for the acts of superior officials than for those of subordinates. For the former it is responsible, provided only that the local remedies, if any, have been exhausted without redress being secured. Thus in *The Sidra*<sup>2</sup> the Anglo-American Claims Tribunal awarded damages

<sup>1</sup> In two articles on 'International Law and the Property of Aliens' in *B.T.I.L.*, 1928 and 1929, Sir John Fischer Williams and Mr. A. P. Fachiri reach opposite conclusions on this matter.

<sup>2</sup> Nielsen's Report, p. 452.

to Great Britain in respect of injury to a British merchant vessel to which the negligent navigation of an American government vessel in Baltimore harbour had contributed; and in the *Zafiro*<sup>1</sup> the same tribunal awarded compensation for British property looted by the Chinese crew of an American supply ship at Manila, on the ground that in the circumstances the American officers were at fault in letting the crew get out of hand; there would have been no liability for the action of the crew as such. For the actions of subordinate employees of the state, such as unofficered soldiers, members of a crew, policemen, and the like, some further act or omission is necessary to fix the state with responsibility, that is to say, something more than a mere failure to redress the wrong. There must be either a 'denial of justice' in the sense defined below, or something which indicates the complicity of the state in, or its condonation of, the original wrongful act, such as an omission to take disciplinary action against the wrongdoer.

The term 'denial of justice'<sup>2</sup> is sometimes loosely used to denote *any* international delinquency towards an alien for which a state is liable to make reparation. In this sense it is an unnecessary and confusing term. Its more proper sense is an injury involving the responsibility of the state committed by a court of justice, and on the question what acts of this kind do involve the state in responsibility there are two views.

<sup>1</sup> Nielsen's Report, p. 578.

<sup>2</sup> See Fitzmaurice, 'Meaning of the Term Denial of Justice', *B.Y.I.L.*, 1932, p. 93.

Most Latin-American states insist on a very narrow interpretation, and contend in effect that if the courts give a decision of any kind there can be no denial of justice and consequently no responsibility of the state for their conduct. Nothing but the denial to foreigners of access to the courts can be properly regarded as a denial of justice. This view, which involves the virtual rejection of the principle of an international standard applicable to the action of courts of law towards foreigners, cannot be accepted. There are many possible ways in which a court may fall below the standard fairly to be demanded of a civilized state without literally closing its doors. Such acts cannot be exhaustively enumerated, but corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, are instances. Possibly it is convenient also to include in the term certain acts or omissions of organs of government other than courts, but closely connected with the administration of justice, such as execution without trial, inexcusable failure to bring a wrongdoer to trial, long imprisonment before trial, grossly inadequate punishment, or failure to enforce a judgment duly given. But no merely erroneous or even unjust judgment of a court will constitute a denial of justice, except in one case, namely, where a court, having occasion to apply some rule of international law, gives an incorrect interpretation of that law, or where it applies, as it may be bound by its municipal law to do, a rule of

municipal law which is itself contrary to international law.

It will be observed that even on the wider interpretation of the term 'denial of justice' which is here adopted, the misconduct must be extremely gross. The justification of this strictness is that the independence of courts is an accepted canon of decent government, and the law therefore does not lightly hold a state responsible for their faults. It follows that an allegation of a denial of justice is a serious step which states, as mentioned above, are reluctant to take when a claim can be based on other grounds.

The desire of certain states to limit their international responsibility as strictly as possible in the matter of the treatment of foreigners has already been referred to; it appears clearly in the decisive importance which they try to attach to the absence of discrimination between foreigners and nationals, and in the narrow sense which they give to a denial of justice. But besides contending for a restricted interpretation of their legal obligations, some states have attempted to exclude their responsibility altogether by a term in the contract which they make with the alien whereby the latter purports to waive the protection of his own state. Such a term is known as a 'Calvo Clause'. It takes different forms, but the following is a typical illustration:

'The contractor and [his employees] shall be considered as Mexicans in all matters within the Republic of Mexico concerning . . . the fulfilment of this contract. They shall not claim, nor shall they have, with regard to

the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans. . . . They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted.<sup>1</sup>

The validity of a Calvo clause has often been considered by international tribunals and their decisions are not uniform. The objection to it is that the individual who enters into the contract cannot waive a right which belongs not to himself but to his government; and if the clause is so framed as to make him purport to do this, to that extent at any rate it should be held to be a nullity. 'Such government', as the Commission said in the case from which the clause above is taken, 'frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract tie in this respect the hands of his government.'

It is apparent from the preceding discussion that a state incurs no responsibility for an injury suffered by an alien unless some fault either of commission or omission can be attributed to itself. It follows that it is not responsible for an injury which results from the act of a private individual. Such an act, however, may be an occasion out of which state responsibility may indirectly arise, but only if it is accompanied by

<sup>1</sup> *North American Dredging Co. of Texas v. Mexico*. Opinions of U.S.-Mexican Claims Commission, p. 21.



circumstances which can be regarded as in some way, by complicity before or condonation after the event, making the state itself a party to the injurious act of the individual. It is therefore necessary in such a case to ask firstly, whether the state ought to have prevented the injurious act, and secondly, whether it has taken the remedial steps which the law requires of it. Thus where the injury in question would not have occurred if the state through its officers had been reasonably diligent, responsibility will be incurred. The standard of diligence naturally varies with circumstances. For example, the fact that the individual was one of a mob of rioters or of a body of insurgents might, according to circumstances, indicate either that special precautions ought to have been taken, or that the authorities were faced with a situation so difficult that they could not reasonably be expected to do more than they did.<sup>1</sup>

The application of this principle to *political* crimes was authoritatively defined by a Committee of Jurists appointed by the Council of the League after the murder of the Italian General Tellini on Greek territory in 1923, in the following terms:

'The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest, and bringing to justice of the

<sup>1</sup> Compare the case *Youmans v. Mexico*, U.S.-Mexican Claims Commission Reports, p. 150, with that of the *Home Missionary Society*, before the Anglo-American Claims Tribunal, Nielsen's Report, p. 421.

criminal. The recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf.'

If there has been no failure of diligence on the part of the state in its preventive measures, it may still incur responsibility through the injurious act of a private individual, but only in the event of a denial of justice in the sense already discussed. A state is not required to *guarantee* the effectiveness of its remedial machinery, and therefore the mere failure of the injured person to secure adequate redress through the courts, that failure being due to something less than a denial of justice, is not enough to fix the state with liability.

It has been stated that the theory underlying the law of state responsibility for injuries to foreigners is that the claimant state seeks redress, not directly for an injury to one of its nationals, but for an injury suffered by itself *through* its national. If this principle were consistently applied, we might expect that the measure of damages would be determined by assessing the injury suffered by the state, and so arriving at a figure which would bear no necessary relation to the extent of the loss suffered by the injured individual. This, however, is not the law; for though in practice tribunals exercise a rather wide discretion in fixing the amount of reparation due, they base it primarily on an estimate of the loss caused to the injured individual, or, if he has lost his life, on the loss caused by his death to his dependants.<sup>1</sup>

<sup>1</sup> For a discussion of some of the difficulties of applying this

§ 8. *The Limits of Criminal Jurisdiction*<sup>1</sup>

International practice on this matter is not uniform. It is agreed that a state is competent to deal with any offence committed within its territory, without regard to the nationality of the offender. It is agreed also that a state may assume jurisdiction over offences committed by its own nationals abroad, though not all states do so. It is not agreed whether a state may in any circumstances punish a foreigner for an act committed outside its territory, and therefore at a time when he was not subject to that state's criminal law.

Three different practices exist on the matter. One group of states, which includes Great Britain and the United States, takes its stand on the principle of the territoriality of criminal jurisdiction; we do not admit that a state may punish an alien for a breach of its criminal law, if the act was committed outside its territory and therefore in a place at which that law was not in force. Another group, which includes France, Germany, and perhaps a majority of states, also accepts the principle of territoriality, but admits certain exceptions, generally for acts directed against the security of the state or its financial credit. The third group, which includes Turkey, Italy, and some others, rejects the territorial principle, and seems to base its law on the theory that crime, wherever committed, is a social evil which all civilized states are principle see an article by the present writer, 'The Theory of Implied State Complicity in International Claims', in *B.Y.I.L.*, 1928.

<sup>1</sup> Cf. W. E. Beckett, *ibid.*, 1925, p. 44, and 1927, p. 108.

interested in suppressing; in practice these states avoid the anarchy of jurisdictions to which this so-called 'universal' theory of crime might lead by certain concessions to the territorial principle, and apply their criminal law only to the acts of foreigners committed abroad when these are prejudicial to the state or to one of their own nationals.

Great Britain and the United States, however, though they deny the legitimacy of exceptions to the territorial basis of criminal jurisdiction over non-nationals, admit that in certain circumstances a crime may be committed *within* the territory of a state and therefore be justiciable by its criminal courts, even though the actor may be physically outside the territory. An obvious illustration would be that of a man who fires a gun across a frontier and kills another man in a neighbouring state; in such a case the jurisdiction of the country from which the gun is fired has been called 'subjective', and that of the country in which the shot takes effect 'objective territorial jurisdiction'. The existence of this objective territorial jurisdiction has been recognized frequently by English and American courts, e.g. in *Rex v. Godfrey*,<sup>1</sup> an English court ordered the extradition to Switzerland for trial there of a man who, being himself in England, was alleged to have procured his partner, who was in Switzerland, to obtain goods there by false pretences; and in *Ford v. United States*<sup>2</sup> in 1927 the Supreme Court upheld the conviction for conspiracy against the United States liquor laws, of

<sup>1</sup> [1923] 1 K.B. 24.

<sup>2</sup> 273 U.S. 593.

certain British subjects whose ship was at the time on the high seas. Such cases appear to justify the dictum of Judge Moore in the *Lotus* case, mentioned below, that

‘It appears to be now universally admitted that when a crime is committed in the territorial jurisdiction of one state as the direct result of the act of a person at the time corporeally present in another state, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former state, should he come within its territorial jurisdiction.’

It is clear that the recognition of an objective territorial jurisdiction by states which do not in terms admit any exception to the territorial basis of criminal jurisdiction, much reduces the gulf between their view and that of the second group of states just mentioned, at any rate if we may assume that these states would not claim to define acts directed against their security in an arbitrary way so as to include, for example, criticism of their governments published in a foreign press. But the objective territorial theory does not meet at all the views of states which claim a universal competence for their criminal courts, and even if this claim is limited in practice to a claim to try offences against nationals, it rests on a false view of the nature of the right of protecting nationals which international law recognizes; states have a right of diplomatic protection, a right to demand reparation for injuries done to their nationals abroad, but not a right to throw the shield of their own



criminal law round them at a time when they have left its shelter.

The Permanent Court considered the law on this matter in the case of the *Lotus*,<sup>1</sup> which arose out of a collision in the Aegean Sea outside Turkish territorial waters, between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt*, in which the *Boz-Kourt* was sunk with loss of life. The *Lotus* proceeded to Constantinople, where the officers in charge of both ships were tried and convicted of manslaughter. The Turkish court appears to have acted under an article of the Turkish Penal Code, giving jurisdiction, with certain limiting conditions, to Turkish courts to try any foreigner who commits an offence abroad to the prejudice of Turkey or of a Turkish subject. The French Government denied the validity of this article in international law. The majority of the Court, consisting of six judges, refrained from expressing an opinion on the international validity of the provision of the Turkish law, but held that no rule of international law forbade the Turkish Court to assume jurisdiction in the specific facts of this case, since the effects of the offence had been produced on the Turkish vessel, although the actor himself was on board the French vessel. Another Judge, Mr. Moore, agreed with the result at which the majority had arrived, but he held that the provision of the Turkish law was 'contrary to well-settled principles of international law'. It meant, he said, that

'the citizen of one country, when he visits another country,

<sup>1</sup> Publications of the Permanent Court, Series A, Judgment No. 10.

takes with him for his protection the law of his own country, and subjects those with whom he comes into contact to the operation of that law. In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes. . . . No one disputes the right of a state to subject its citizens abroad to the operations of its own penal laws, if it sees fit to do so. . . . But the case is fundamentally different where a country claims either that its penal laws apply to other countries and to what takes place wholly within such countries, or, if it does not claim this, that it may punish foreigners for alleged violation, even in their own country, of laws to which they were not subject.'

The five remaining judges dissented from the judgement of the Court.

It will be observed that the majority of the Court, by assimilating the Turkish vessel to Turkish territory, brought the case under the principle of the 'objective territorial jurisdiction'. That principle, as stated above, is accepted generally, but its application to the collision of two ships at sea was described by Lord Finlay in his dissenting judgement as 'a new and startling application of a metaphor'. 'The jurisdiction over crimes committed on a ship at sea', he said, 'is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships. . . . Criminal jurisdiction for negligence causing a collision is in the courts of the country of the flag.' Lord Finlay's view accords with

the understanding of maritime law which has been generally accepted hitherto, and maritime organizations have expressed their concern at the judgement.

§ 9. *Jurisdiction on the High Seas*

At the time when international law came into existence most maritime states claimed sovereignty over certain seas; for example, Venice claimed the Adriatic, England the North Sea, the Channels, and large areas of the Atlantic, Sweden and Denmark the Baltic. Such claims were often disputed, but the principle that sovereignty might exist over the sea was not. Indeed the modern theory that the open sea is free and common to all would have been unsuited to the times. The state which claimed the seas often rendered a service to all by policing them against piracy; and in return it claimed proprietary rights over them. It might require ceremonial honours to be paid to its flag; it might reserve the fisheries for itself, or make foreigners take out a licence; it might levy tolls on the ships of other nations; sometimes it even prohibited navigation to them altogether.

It was the abuse of such rights by Spain and Portugal in the sixteenth century that prepared the ground for a reaction against these claims. Under Bulls of Pope Alexander VI of 1493 these two powers claimed to divide the New World between themselves; Spain claimed the whole Pacific and the Gulf of Mexico; Portugal the Indian Ocean and most of the Atlantic, and both excluded foreigners from these vast areas.

The claims of the Portuguese in 1609 provoked the *Mare Liberum* of Grotius, in which he maintained that the sea could not be made the property of any state. His attack met with general opposition, and in England John Selden replied to him with the *Mare Clausum*, published in 1635, maintaining the English claims. As yet there was no general hostility to the existence of sovereignty over the sea; what the nations wanted, and what they gradually succeeded in establishing, was freedom of navigation, which was quite consistent with the existence of sovereignty;<sup>1</sup> England, for example, never prohibited navigation over the English seas. But gradually the more extreme claims have been dropped, and by the end of the first quarter of the nineteenth century the freedom of the *open* sea may be regarded as established. There is still, as we have seen, room for doubt on the question what seas are 'open' and what are 'territorial', and as late as 1889 the Congress of the United States legislated against seal-killing in large tracts of the Behring Sea, thereby continuing a claim which Russia had upheld there before the cession of Alaska in 1867; the claim, however, was rejected by arbitrators in 1893. But though the principle of freedom is now established it would be impossible to leave the seas, which are used by the ships of all nations, unregulated by any law, and it is necessary therefore to determine the circumstances in which a state may extend its authority to the seas.

Every state has jurisdiction over ships flying its

<sup>1</sup> Cf. Hall, pp. 182-3.

flag on the high seas; it may apply its law, civil and criminal, to all on board irrespective of their nationality. The justification of this principle is simply that *some* law must prevail on ships, and there is no other law to compete with that of the flag state; it is needless to explain it by regarding ships as floating portions of a state's territory, a metaphor which, if pressed, would lead to the absurd result that the waters surrounding a ship from time to time would be territorial waters. Collisions at sea between two ships of different nationality raise a difficulty. These most commonly give rise to proceedings *in rem*, and according to British practice at least such proceedings may be brought in the courts of any state in which the ship at fault may be found. Criminal proceedings would be taken in the courts of the state of the defendant, but if the decision of the majority in the *Lotus* case<sup>1</sup> is correct, the state of the injured ship would have concurrent jurisdiction. Jurisdiction over a personal action would be determined by the rules of *private* international law, with which we are not concerned.

It follows from the principle of each state's jurisdiction over its own ships, that no state has a general right to police the high seas. But there are certain special cases in which such a right is admissible. Thus a state may seize and bring into port any ship sailing under its national flag without authority, and such a ship may be confiscated in its courts. Again, if a foreign ship has committed an offence in territorial waters and escaped to the high seas, the pursuit may

<sup>1</sup> *Supra*, p. 221.



be continued there and the ship brought back and dealt with; this is called the right of 'hot pursuit', and the conditions of its exercise are that the pursuit must follow immediately on the escape of the vessel and be continuous. There are also numerous cases in which by treaty states have accorded to other states certain rights of police or jurisdiction over their ships. Thus the United States, during the era of prohibition, negotiated treaties with many other maritime states, including Great Britain, whereby its authorities might search a private ship within a certain distance outside American territorial waters, and if there were reasonable cause for doing so, might take it in for adjudication by the American courts. The North Sea Fisheries Convention of 1882 gives the signatory states rights of search over one another's fishing vessels, but the adjudication over offences against the fishery regulations was reserved for the state of an offending vessel. Similar rights have been agreed to for the protection of submarine cables, and for the suppression of slave-trading. Apart from convention slave-trading is not illegal by international law; but during the nineteenth century various conventions were made for the suppression of the trade, e.g. the Congress of Vienna, 1815, declared it illegal; and the Berlin African Conference, 1885, and the Brussels Anti-Slavery Conference, 1890, adopted measures for suppressing it in Africa. The practical difficulty lay always in the extreme reluctance of states to allow their ships to be searched by the ships of other states, but the reduction of slavery itself during the nineteenth

century reduced the dimensions of the problem, and these and other treaties eventually gave the armed vessels of one state power to search the suspected ships of another within certain geographical limits. The matter is now regulated by a Convention signed at St. Germain in 1919.

Any state may seize pirates on the high sea and bring them in for trial by its own courts, on the ground that they are 'hostes humani generis'. But this applies only to persons who are pirates at international law, and acts may be piratical at municipal law which are not so at international law; for example, in English criminal law it is piracy to engage in slave-trading. There is no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority. Thus an act cannot be piratical if it is done under the authority of a state, or even of an insurgent community whose belligerency has been recognized.

The Privy Council has recently made a full examination of the authorities on the definition of piracy, and without attempting an exhaustive definition itself, it has advised that actual robbery is not an essential element in the crime, and that a frustrated attempt to commit a piratical robbery is equally piracy.<sup>1</sup> The ordinary motive of a piratical act is doubtless an intent to rob, but if the other elements of piracy are present the motive is probably

<sup>1</sup> *In re Piracy jure gentium*, [1934] A.C. 586.

immaterial. It may equally well be to kill or merely to destroy.

Self-defence, within the limits defined later, may in exceptional circumstances justify the exercise of authority by a state on the high seas. For example, in 1873 the Spaniards captured on the high seas an American vessel, the *Virginus*,<sup>1</sup> which was on its way to assist insurgents in Cuba. In that action the Spanish authorities were clearly justified, although they afterwards put themselves in the wrong by the summary execution of certain British and American citizens who were on board the *Virginus*.

<sup>1</sup> Cf. Hall, p. 328.

## VII

### TREATIES

CONTRACTUAL engagements between states are called by various names—treaties, conventions, pacts, acts, declarations, protocols. None of these terms has an absolutely fixed meaning; but a treaty suggests the most formal kind of agreement; a convention or a pact generally, but not always, an agreement less formal or less important; an act generally means an agreement resulting from a formal conference and summing up its results; a declaration is generally used of a law-declaring or law-making agreement, e.g. the Declarations of Paris and of London, but such agreements are equally often called conventions, e.g. the Hague Conventions; 'protocol' is a word with many meanings in diplomacy, denoting the minutes of the proceedings at an international conference, an agreement of a less formal kind, or often a supplementary or explanatory addendum to another treaty, e.g. the Geneva Protocol of 1924, so called because intended to amend the Covenant.

#### § 1. *Formation of Treaties*

International law has no technical rules for the formation of treaties. In most respects the general principles applicable to private contracts apply; there must be consent and capacity on both sides, and the object must be legal; though naturally, rules

peculiar to a special system of municipal law, such as the Common Law rules about consideration, have no application. But there is one startling difference. Duress does not invalidate consent, as it does in the municipal law of contract. A dictated treaty is as valid legally as one freely entered into on both sides.

Historically the explanation of this state of the law is easily understood; it is that so long as international law was not strong enough to forbid the settlement of disputes by force, it would have been idle for it to refuse to recognize an agreement induced by force. Clearly there is here a grave defect in the law. On the other hand, it is important not to mistake the direction in which it is desirable that the law should move in this matter. A dictated treaty obviously violates the first principle of any civilized law of contracts, which is freedom of consent on both sides, and, so long as we regard it as a contract, we are naturally tempted to look forward to a time when the law will be strong enough to deny its validity. But if we look more closely at some of the consequences of such a development we may begin to suspect that there may be some fallacy in the premisses from which we have started. For instance, when a treaty is eventually made between Germany and the victors in the recent war, it will certainly contain restrictions on German armaments which Germany will only accept because she has no option. As the law stands these restrictions will be legally binding; but do we really believe that they *ought not* to be binding, and that if international law were a more satisfactory system than it



is, they would not be so? The matter is even more clear if we look forward to a time when, we may hope, the law will have been provided with a workable system of sanctions against aggression; surely then we shall not say that if, under pressure of sanctions, an aggressor state has been forced to accept certain onerous obligations, those obligations ought not to be upheld by the law.

The truth is that it is only in outward form that a dictated treaty is a contract; really it belongs to a different category of legal transactions, for the essence of it is that the state or states imposing the treaty are claiming the right to *legislate* for the state coerced. The true anomaly in the present law is not that it should be legal to coerce a state into accepting obligations which it does not like, but that it should be legal for a state which has been victorious in a war to do the coercing; and the change to which we ought to look forward is not the elimination of the use of coercion from the transaction, but the establishment of international machinery to ensure that when coercion is used it shall be in a proper case and by due process of law, and not, as at present it may be, arbitrarily. The problem of treaties imposed by force is therefore in its essence not a problem of treaty law, but a particular aspect of that much wider problem which pervades the whole system, that of subordinating the use of force to law.

Ordinarily there are two stages in the making of a treaty, its signature by 'plenipotentiaries' of the contracting states, and its ratification by or on behalf of

the heads of those states. There are good reasons why this second stage should be necessary before a treaty, at any rate an important treaty, becomes actually binding. In some states, for example, constitutional law vests the treaty-making power in some organ which cannot delegate it to plenipotentiaries, and yet cannot itself carry on negotiations with other states; for example, in the United States the power is vested in the President, but subject to the advice and consent of the Senate. But apart from such cases the interests with which a treaty deals are often so complicated and important, that it is reasonable that an opportunity for considering the treaty as a whole should be reserved. A democratic state must consult public opinion, and this can hardly take shape while the negotiations, which must be largely confidential, are going on. These being the reasons that render ratification necessary, it is clearly impossible, as is done by some writers, to specify the circumstances in which a refusal to ratify is justified and those in which it is not. There is no legal nor even a moral duty on a state to ratify a treaty signed by its own plenipotentiaries; it can only be said that refusal is a serious step which ought not to be taken lightly.<sup>1</sup>

<sup>1</sup> But this is only the modern law. Formerly a plenipotentiary was what the name implies, an agent having 'full powers' to bind his principal by his acts. Ratification was then merely the formal confirmation of an obligation which the agent had already created for his principal, and it could not honourably, or perhaps even legally, be withheld. It is probably a relic of this former state of things which leads to the doubts still sometimes expressed on the matter. The question is examined in J. Mervyn Jones's *Full Powers and Ratification*.

Ratification is not, however, a legal requisite in all cases. There are many agreements of minor importance in which it would be an unreasonable formality, and ordinarily the treaty itself shows, either expressly or by implication, whether it is to become binding on signature or not until it has been ratified. Whether, if no indication of intention can be obtained in this way, we are to presume that ratification is intended to be necessary, or that the treaty is to be binding without it, is not certain. Most modern writers have taken the former view, but this has been doubted.<sup>1</sup> It is pointed out that when states think it necessary to reserve a treaty for ratification, their practice is to insert an express reservation of the right to ratify in the 'full powers' of their plenipotentiaries, and that this practice would be unnecessary if there existed a rule making ratification necessary unless it is expressly or impliedly dispensed with. In any case the doctrine accepted by most text-writers does not, it seems, represent the ordinary practice of diplomacy.

Ratification must be unconditional, for modifications of the agreed terms of a treaty cannot be introduced by one party only; a conditional ratification is in effect a new proposal which the other party or parties are free either to accept or reject. This objection does not apply to the common practice of making reservations at the signature of a treaty, for in this

<sup>1</sup> See Fitzmaurice, in *B.T.I.L.*, 1934, 'Do Treaties Need Ratification?' The Permanent Court, however, has referred to 'the rule that conventions, save in certain exceptional cases, are binding only by virtue of ratification' as one of 'the ordinary rules of international law'. (Series A, No. 23, at p. 20.)

case the reservations of a state are known to the other parties, and if they sign and subsequently ratify the treaty, they must be regarded as having accepted the reservations. On the other hand, in modern times, it is not unusual for states which have negotiated among themselves a treaty of general interest, to invite other states to accede to it; such an accession, like ratification, and for the same reasons, must be unconditional.

Article 102 of the Charter of the United Nations requires that 'every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it'. A somewhat similar article in the Covenant of the League of Nations had left in some doubt the effect that a failure to register would have on a treaty. The Charter now makes it clear that the effect is not to take away the validity of the treaty for all purposes, but that it may not be invoked 'before any organ of the United Nations'. As one of these organs is the International Court of Justice the effect of non-registration may be very important.

There are no technical rules in international law for the interpretation of treaties; its object can only be to give effect to the intention of the parties as fully and fairly as possible. But lawyers who are trained in the methods of interpretation applied by an English court should bear in mind that English draftsmanship tends to be more detailed than Continental, and

it receives, and perhaps demands, a more literal interpretation.<sup>1</sup> Similarly, diplomatic documents, including treaties, do not as a rule invite the very strict methods of interpretation that an English court applies, for example, to an Act of Parliament. In particular the method of *historical* interpretation, which allows the history of negotiation, the *travaux préparatoires* as they are called, to be examined for the purpose of ascertaining the intention of the parties, as well as the actual terms of the treaty in which they have attempted to express this intention, is admissible in international law; though the Permanent Court has pointed out that this method should be resorted to only when the terms of the treaty itself are not clear, and only when all the parties before the Court have taken part in the preparatory work.<sup>2</sup>

The general rule is that treaties create rights and duties only for the parties to them; *pacta tertiis nec nocere nec prodesse possunt*. But the Permanent Court has held that if it is shown that the parties intended to confer a right to enforce the treaty on a state not a party to it, there is nothing in international law to prevent effect being given to this intention. It is not, they say,<sup>3</sup> to be lightly presumed that this was the intention; but in each case it must be ascertained 'whether the states which have stipulated in favour of a third state meant to create an actual right which

<sup>1</sup> Cf. Westlake, *International Law*, Part I, p. 282.

<sup>2</sup> e.g. Series A, Judgment no. 9, p. 16, and no. 23, p. 41.

<sup>3</sup> *Free Zones of Upper Savoy and the District of Gex*, Series A/B, No. 46, at p. 147.



the latter has accepted as such'. But this view is not free from difficulties, some of which were pointed out by dissenting judges on the Court. Does it mean that the parties cannot modify or abrogate the right which they have conferred by their treaty on a third state? It would be going rather far to hold that the parties to a treaty cannot alter its terms if they are all agreed in wishing to do so; but if they are free to take away what they have given, what the third state has received can hardly be called an 'actual right'. Perhaps, however, the carefully guarded language of the Court removes this difficulty. The parties can tie their own hands if they wish to do so, but the question is one of intention and such an intention must be very clear.

### § 2. *Discharge of Treaties*

Of the methods by which a treaty may be discharged,<sup>1</sup> some, such as mutual consent, performance of the obligations under it, or the expiration of a time-limit need no special discussion. But there are more difficult cases. From the time of Grotius<sup>2</sup> many writers have propounded the view that the breach of *any* term of a treaty by one party will release the other from all obligations of the treaty, but this doctrine, applied to any of the more important treaties, would lead to results so startling that it has never been adopted in international practice, and ought equally to be rejected by legal theory. There is an absence of

<sup>1</sup> On this question see McNair, 'La Terminaison et la dissolution des traités', in *Hague Recueil*, 1928, vol. xxii, p. 463.

<sup>2</sup> *De jure belli*, ii. 15, 15.

decisive authority on the matter, but common sense seems to impose a distinction between terms which are material to a main object of the treaty and those which are not<sup>1</sup> and between breaches which are serious in themselves and those which are trivial. There can be no right to rescind on account of the breach of a stipulation which is itself unimportant, nor on account of a trivial breach even of an important stipulation. No doubt such distinctions may not always be easy to apply, but the difficulty is one for which every municipal law of contract has to seek, and generally finds, a solution.

The outbreak of war is another event which may bring a treaty to an end, but the modern view is that it does not necessarily do so. 'The effect of war upon the existing treaties of belligerents', said Mr. Justice Cardozo in *Techt v. Hughes*,<sup>2</sup> 'is one of the unsettled problems of the law. The older writers sometimes said that treaties ended *ipso facto* when war came. The writers of our own time reject these sweeping statements. International law to-day does not preserve treaties or annul them regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules.' He went on to say that in his opinion the standard is that 'provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected'.

<sup>1</sup> The treatment of this question by Hall, *International Law*, 8th ed., p. 408, is useful.

<sup>2</sup> [1920] 229 N.Y. 222.

One reason for the uncertainty of the law on this subject is that belligerents do not as a rule leave the fate of their pre-war treaties to depend on the operation of legal principles; in order to avoid uncertainty they usually specify, in the treaty ending a war, which of their pre-war treaties are to be revived and which are to lapse. It is only if this has not been done that it is left to courts to determine their fate, and to establish sound principles of law on the matter.

Sir Cecil Hurst<sup>1</sup> has suggested a rather different approach to the question, that the fate of a treaty depends on the intention of the parties. In some cases their intention is clear; for instance, a treaty which regulates the conduct of war, as many of the Hague Conventions did, is clearly intended to retain its force if war breaks out. But more often the minds of the parties have not been addressed to the possibility that they may some day be at war with one another, and they cannot be said to have had any real intention as to what should happen to their treaty in that unforeseen event. Such a difficulty as this, however, is in no way peculiar to the interpretation of treaties, and law often does not hesitate to attribute an intention to parties who have never thought of the situation with which in the event the law has to deal. In such a case the so-called intention is a 'presumed' intention, it is what the law thinks it reasonable to suppose that the parties *would* have intended if the situation had been present to their minds.

Probably we shall arrive at much the same result

<sup>1</sup> 'The Effect of War on Treaties', *B.Y.I.L.*, 1921-2, p. 37.

whether we apply the objective test suggested by Mr. Justice Cardozo or the subjective test of Sir Cecil Hurst. In either case we must not assume that all treaties can be neatly classified into the three categories of those which are abrogated, those which are only suspended, and those which are not affected, by the outbreak of a war. We have rather to examine the particular treaty with which we are concerned in the light both of its subject-matter and of all the relevant surrounding circumstances. Certain presumptions will no doubt emerge. Treaties dealing with political matters or with commercial relations may be assumed to have been made with reference to the relations existing between the parties at the time, and generally we shall find that the provisions of such treaties are incompatible with a state of war, or, if we prefer to put it in the other way, that the parties must have intended that war should abrogate them. On the other hand, a multilateral treaty, such as a postal convention, though its operation will obviously have to be suspended between the belligerents while the war lasts, will by the same reasoning generally revive and recover its force when the war is over.

One of the most difficult and practically important questions of the law of treaties relates to the termination of treaties which contain, at any rate in their expressed terms, no provision for that purpose. Such treaties raise two questions which require discussion: firstly, whether one party may in any circumstances give notice to terminate the treaty without the consent

of the other, and secondly, whether it is liable to be terminated by the operation of any rule of law.

The answer to the former of these questions is probably that we must inquire into the intention of the parties. There is certainly no general right of denunciation of a treaty of indefinite duration; there are many such treaties in which the obvious intention of the parties is to establish a permanent state of things, for example, the Pact of Paris; but there are some which, from the nature of the subject-matter or the circumstances in which they were concluded, we may fairly presume were intended to be susceptible of denunciation even though they contain no express term to that effect. A *modus vivendi* is an obvious illustration; treaties of alliance and of commerce are probably in the same case, though in practice such treaties ordinarily have a fixed period of duration. On the other hand the probability is that a treaty providing for extraterritoriality or for neutralization would be intended to be permanent.

The second question brings us to the great problem of the obligatory force of treaties in general.

It is a truism to say that no international interest is more vital than the observance of good faith between states, and the 'sanctity' of treaties is a necessary corollary. On the other hand, the circumstances in which a treaty was made may change, and its obligations may become so onerous as to thwart the development to which a state feels itself entitled; and when this happens, it is likely, human nature being what it is, that a state which feels itself strong enough



will disregard them, whether it has a legal justification for doing so or not. This is particularly likely to happen when a treaty has been imposed on a state after defeat in a war; and while it may be expedient in the present state of international relations to uphold the principle which declares such a treaty to be as binding in law as one voluntarily entered into on both sides, it argues a lack of candour to support that practice by appealing to moral considerations, as we do when we speak of the 'sanctity' of all treaties without distinction. It may be, therefore, that if international law insists too rigidly on the binding force of treaties, it will merely defeat its own purpose by encouraging their violation.

Every system of law has to steer a course between the two dangers of impairing the obligations of good faith by interfering with contractual engagements, and of enforcing oppressive or obsolete contracts. In our national law we have long ceased to regard absolute freedom of contract as either possible or socially desirable; our courts will not enforce contracts which have been induced by fraud or duress, or whose object is contrary to public policy, and legislative interference with contracts becomes more and more active as social relations become more complicated. No such process has yet been possible in international law; no doctrine of international public policy exists as yet to restrict the freedom of states to insert in their treaties such provisions as they think fit. One or two illustrations will show how dangerous is the problem which this state of the law creates.

By the Treaty of Paris, 1856, the Black Sea was declared to be neutralized, and Russia, which had just been defeated in the Crimean War, agreed not to maintain a fleet on it. In 1870 she took advantage of the Franco-German War to repudiate this obligation. Great Britain protested against this action, and eventually the powers that had been parties to the Treaty of Paris agreed, in the Treaty of London, 1871, to release Russia from the restriction; and they solemnly united in this declaration: 'It is an essential principle of the law of nations that no power can free itself from the engagements of a treaty, nor modify its terms, except with the assent of the contracting parties by means of a friendly understanding.' No doubt it was impressive that the chief powers of Europe should unite in maintaining the sanctity of treaties, even while they condoned the breach of one by Russia, but it was also very futile; in effect they were burying their heads in the sand, and refusing to admit that a real problem existed. Again, by the Treaty of Berlin, 1878, Bosnia and Herzegovina, provinces of Turkey, were to be 'occupied and administered' by Austria-Hungary; and Bulgaria was to be an autonomous principality under the suzerainty of the Sultan. In 1908 the Prince of Bulgaria took advantage of the Young Turk Revolution to declare Bulgaria independent; at the same time Austria took advantage of Russia's weakness after the Russo-Japanese War to annex Bosnia and Herzegovina. Sir E. Grey protested against these violations of the Treaty of Berlin, and demanded a conference

to consider whether its revision was necessary; but in the end the violations had again to be condoned. Once again, in April 1935, the Council of the League reaffirmed the declaration of 1871, and solemnly condemned Germany's repudiation of the military articles of the Treaty of Versailles. On each of these occasions a state may or may not have had some moral claim to have the obligations of a treaty revised, but it also had good reason to believe that it was unlikely to be able to secure that revision by action within the law.

J. S. Mill, writing of the Russian action in 1870, uttered a warning which international law has yet to take to heart:

'If a lawless act has been committed in the present instance, it does not entitle those who imposed the conditions to consider the lawlessness only, and to dismiss the more important consideration whether, even if it was wrong to throw off the obligation, it would not be still more wrong to persist in enforcing it. If, though not fit to be perpetual, it has been imposed in perpetuity, the question when it becomes right to throw it off is but a question of time. No time being fixed, Russia fixed her own time, and naturally chose the most convenient.'<sup>1</sup>

Mill also suggested two rules for adoption by the nations: 'they should abstain from imposing conditions which, on any just and reasonable view of human affairs, cannot be expected to be kept. And they should conclude their treaties, as commercial

<sup>1</sup> Quoted from the *Fortnightly Review* by Moore, *Digest of International Law*, vol. v, p. 339.

treaties are usually concluded, only for a term of years.'

These are counsels of perfection which states at present are not always willing to follow. In the meantime the problem of the attitude of international law to oppressive or obsolete treaty obligations remains, and an attempt has been made by many writers to solve it by the doctrine known as the *clausula rebus sic stantibus*. In every treaty, it is said, there is implied a clause which provides that the treaty is to be binding only 'so long as things stand as they are'; the expressed terms may be absolute, but a treaty is never more than conditional, and when a 'vital change of circumstances' has occurred, the condition of the treaty's validity has failed, and it ceases to be binding.

Such a doctrine, if it is to be accepted into the law, clearly needs careful definition. Otherwise it is capable of being used, and it often has been used, merely to excuse the breach of a treaty obligation that a state finds it inconvenient to fulfil. For example, German controversialists appealed to it to justify the violation of Belgian neutrality in 1914, in breach of the guarantee contained in the Treaty of London, 1831.

There seems to be no recorded case in which its application has been admitted by both parties to a controversy, or in which it has been applied by an international tribunal. But in the case of the *Free Zones of Upper Savoy and the District of Gex*<sup>1</sup> the Permanent Court had to consider an argument by

<sup>1</sup> Series A/B, No. 46, at p. 155.

France that the provisions made after the Napoleonic Wars for the withdrawal of the French customs lines some distance behind the Franco-Swiss boundary should be held to have lapsed owing to a change of circumstances. The change alleged was that whereas in 1815 the withdrawal of the customs line had made of Geneva, then practically a free trade area, together with the 'Free Zones', an economic unit, the institution of Swiss federal customs in 1849 had destroyed this unit. The Court said that to establish this position it would be necessary to show that it was *in consideration* of the absence of customs duties at Geneva in 1815 that the Zones were created, and this France failed to prove.

Despite the caution of the language of the Court it seems to define clearly the scope of the doctrine. Not every important change of circumstances will put an end to the obligations of a treaty. The *clausula* is not a principle enabling the law to relieve from obligations merely because new and unforeseen circumstances have made them unexpectedly burdensome to the party bound, or because some consideration of equity suggests that it would be fair and reasonable to give such relief. It bears no analogy to such a principle as that of *laesio enormis* in the Roman law. What puts an end to the treaty is the disappearance of the foundation upon which it rests; or if we prefer to put the matter subjectively, the treaty is ended because we can infer from its terms that the parties, though they have not said expressly what was to happen in the event which has occurred, would, if



they had foreseen it, have said that the treaty ought to lapse. In short, the *clausula* is a rule of construction which secures that a reasonable effect shall be given to the treaty rather than the unreasonable one which would result from a literal adherence to its expressed terms only.

On this view the similarity between the doctrine of *rebus sic stantibus* and that of the 'implied term' in the English law of the frustration of contract is very close. Neither a treaty in international nor a contract in English law is dissolved merely by a change of circumstances; they are only dissolved if a term can fairly be read into them providing that in the event which has happened they *are* to be dissolved. Both doctrines attempt not to defeat but to fulfil the intention, or as the English cases call it the 'presumed intention', of the parties.

It is easy to confuse, but it is important to distinguish, the doctrine of *rebus sic stantibus* and the doctrine which, as we have seen,<sup>1</sup> makes a treaty in certain cases terminable by unilateral denunciation. The same facts may make it necessary to consider both these possibilities, but the similarity between them is only superficial. In 1926 a difference arose between Belgium and China out of the denunciation by the latter of a treaty of 1865,<sup>2</sup> and China in the first instance alleged that she was entitled to denounce the treaty under an article contained in the treaty itself. Belgium disputed this interpretation. Then at a later stage of the discussions China changed her ground,

<sup>1</sup> *Supra*, p. 240.

<sup>2</sup> See *A.J.I.L.*, 1927, p. 289.

claiming that the point at issue was not one of the technical interpretation of this article, but whether or not the principle of *rebus sic stantibus* applied to the case. In the subsequent application of Belgium to the Permanent Court, which unfortunately never reached the stage of judgement, the Belgian memorial stated the question to be whether the unilateral denunciation by China could be considered legally valid *either under the terms of the treaty, or in virtue of the general principles of the law of nations*, and under the latter head it presented arguments dealing with *rebus sic stantibus*. The case illustrates the essential difference between the two modes of terminating a treaty. In one the treaty is terminated by the act of one party because the terms of the treaty, express or implied, give that party the right to terminate it by giving notice; in the other it is not the act of one of the parties that puts an end to the treaty, but the operation of a principle of law, although naturally the question can only be raised if one of the parties gives notice that it claims that the principle applies to the case in hand.

As defined by the Permanent Court the doctrine of *rebus sic stantibus* is clearly a reasonable doctrine which it is right that international law should recognize. But as so defined it is a doctrine of limited scope which has little to do with the problem of obsolete or oppressive treaties, for which it is too often supposed to be the solution. We may well hold that the obligation of a treaty comes to an end if an event happens which the parties *intended*, or which we are justified in

presuming they would have intended, should put an end to it; the more difficult problem concerns an obligation which the parties did *not* intend to be ended, but which it would be oppressive to enforce, and which will probably in fact be violated, in the events which have happened. It is because so many writers have sought to find in *rebus sic stantibus* a solution for this latter problem that the doctrine has become one of the most controversial in international law. But it is a mistake to think that by some ingenious manipulation of existing legal doctrines we can always find a solution for the problems of a changing international world. That is not so; for many of these problems—and oppressive treaties are one of them—the only remedy is that states should be willing to take measures to bring the legal situation into accord with new needs, and if states are not reasonable enough to do that, we must not expect the existing law to relieve them of the consequences. Law is bound to uphold the principle that treaties are to be observed; it cannot be made an instrument for revising them, and if political motives sometimes lead to a treaty being treated as ‘a scrap of paper’ we must not invent a pseudo-legal principle to justify such action. The remedy has to be sought elsewhere, in political, not in juridical action.

The problem of oppressive or obsolete treaty obligations is in fact only one aspect, and not the most important aspect, of a much wider problem of international relations, for the danger to international order comes more often from oppressive

conditions, and especially frontier conditions, than from the obligations of a still executory treaty. Whether these conditions were or were not originally created by a treaty, and whether they have or have not been brought into existence by some change of circumstances, are from a practical point of view irrelevant considerations. But this problem of 'peaceful change' belongs to international relations rather than to international law.<sup>1</sup>

<sup>1</sup> I have discussed this question more fully in my book, *The Outlook for International Law*, ch. viii.

## VIII

# INTERNATIONAL DISPUTES AND THE MAINTENANCE OF INTERNATIONAL ORDER

### § 1. *Amicable Methods of Settlement*

**D**ISCUSSION of the problem of settling international disputes has been confused by the unfortunate practice of using the word 'arbitration' as though it meant nothing more than the peaceful settlement of a dispute. Actually arbitration is a definite legal process, and only one among several methods of peaceful settlement; it is not the only alternative to war. The loose usage of the word is more than a mere matter of terminology; it leads to loose thinking about the problem, for controversy passes unconsciously from one meaning of the word to the other, and gives a false impression of simplicity to what is really a most complicated question of international relations.

The problem of effecting the peaceful settlement of a dispute either between two individuals or between two states admits of two alternative methods of approach; we may either induce the disputing parties to accept terms of settlement which are dictated to them by some third party, or we may persuade them to come together and agree on terms of settlement for themselves. In the international field the former of these methods takes the form either of



arbitration or of judicial settlement, the latter either of good offices, or mediation, or conciliation.

§ 2. *Arbitration and Judicial Settlement*

These two procedures are closely allied; indeed the former is only a species of the latter, for an arbitrator is a judge, although he differs from the judge of a standing court of justice in being chosen by the parties, and in the fact that his judicial functions end when he has decided the particular case for which he was appointed. The distinction is important, because a standing court is able to build up a judicial tradition and so to develop the law from case to case; it is, therefore, not only a means of settling disputes, but to some extent a means of preventing them from arising. But so far as the parties are concerned, they are as likely to get a satisfactory decision from a court of arbitration as from a court of justice, and there may even be special circumstances which make the former a preferable tribunal; for example, some special technical skill in the members of the court may be more important than a profound knowledge of law. Arbitrators and judges are alike bound to decide according to rules of law; neither possess a discretionary power to disregard the law and to decide according to their own ideas of what is fair and just. No doubt the parties, if they choose, may confer such a power on an arbitrator, or they may agree on special rules which he is to apply to the exclusion of the ordinary rules of law, but they may also confer a special power of this kind on a judge, as is expressly

provided in Article 38 of the Statute of the International Court of Justice. It should be added, however, that this purely judicial character of an arbitrator's function is not always recognized; the Continental view of it has been less strict than our own, and arbitrators have sometimes claimed and exercised a discretionary power to give what they regard as a just, rather than a strictly legal, decision. In practice also, courts of arbitration have not always in the past given the reasons on which their decisions were based, so that it is impossible to be sure what view they may have taken of their function.

Arbitration was a fairly frequent method of settling international disputes in medieval times, but with the rise of the modern state system it fell into disuse until its revival in the nineteenth century, largely through the example of Great Britain and the United States in submitting the Alabama Claims to arbitration in 1871. Many different ways of constituting the court have been used; sometimes the head of some foreign state has been appointed, and the award is given in his name, though he is not expected to act personally; sometimes the arbitrators have consisted of representatives of the disputing states, with or without the addition of other members. In the present century a very large number of standing arbitration treaties have been entered into, the earliest being one between Great Britain and France in 1903, which provided that 'differences of a legal nature or relating to the interpretation of treaties' were to be referred to the Hague Permanent Court of Arbitration, provided

'they do not affect the vital interests, the independence, or the honour of the two states, and do not concern the interests of third parties'. In each case a special agreement had to be concluded defining the matter in dispute and the scope of the arbitrator's power. This model was largely followed, but when the United States has made such a treaty, the Senate has insisted on treating the special agreement as a treaty, thus refusing to give a general consent to arbitrate differences, and making its own special consent a necessary condition of each proposed reference.<sup>1</sup>

It is clear that the 'vital interests' clause in these treaties seriously weakened their practical force, for in effect it left the parties free to refuse to arbitrate whenever they thought fit. But this clause only gave a rather crude expression to the fact, not always sufficiently realized by its advocates, that arbitration is not, and cannot be made, a suitable method for settling disputes of every kind. On the whole, however, such value as the treaties had lay rather in expressing the general sentiment of most states in favour of peaceful settlement than in any practical influence on events, for it is improbable that any dispute has ever been arbitrated in virtue of one of these treaties which would not have been arbitrated in any event. A more useful side of the modern movement for encouraging resort to arbitration and judicial settlement is to be found in the institution of convenient machinery for the purpose, which, without interfering

<sup>1</sup> Cf. Cory, *Compulsory Arbitration*, p. 53.

with the freedom of states to agree on any other method, is always available if they care to use it. This development has given us the Permanent Court of Arbitration, and the Permanent Court of International Justice, now replaced by the International Court of Justice.

The Permanent Court of Arbitration was created by the Hague Convention for the Pacific Settlement of International Disputes, made in 1899, and revised in 1907. Each state signatory to the Convention appoints four members, and when two states refer a dispute to the Court, each, unless they agree otherwise, selects two arbitrators from the members, of whom only one may be a national, and the four arbitrators then choose an umpire. The machinery has proved simple and useful, and several important cases have been heard by the Court, including the Newfoundland Fisheries case between Great Britain and the United States in 1910. But the name 'Permanent Court' is a misnomer. There is a *permanent panel of arbitrators*, but the Court itself has to be constituted anew for each case.

An arbitral award is final unless the parties have otherwise agreed. But arbitrators have only such powers as the parties have conferred upon them in the *compromis*, the document by which they refer the dispute to the court, and if the court should depart from the *compromis*, for example, by purporting to decide some question which was not submitted to it, or by not applying the rules of decision agreed to by the parties, it follows that the award is a nullity

without binding force. It is, in fact, not an award at all. Unfortunately if, after the award has been given, one of the parties should allege that it is null and void on this ground, for *excès de pouvoir* as it is commonly expressed, international law does not yet provide any means of determining whether the allegation is or is not well founded. Occasionally the departure from the terms of the *compromis* has been so evident that the parties have agreed to regard the award as null,<sup>1</sup> and sometimes they have agreed to refer the question of nullity itself to a further arbitration.<sup>2</sup> But in default of such an agreement there is a deadlock; there is a gap in the law, or rather in the machinery for applying the law. Fortunately it is not easy for a state to reject an award on the ground of nullity, and so long as arbitration remains a voluntary procedure states count the cost of a possibly adverse decision before they submit to it. Instances of the repudiation of awards on grounds of nullity have therefore not been very common. A remedy might be provided by conferring on the International Court of Justice an appellate jurisdiction in such cases, but though this has often been suggested it has not yet been done.

The Permanent Court of International Justice was created by a treaty, generally called the 'Statute' of the Court, in 1921. Under the Charter of the United Nations it is now replaced by the International

<sup>1</sup> e.g. the award of the King of Holland in the *Maine Boundary* dispute between Britain and the United States in 1831.

<sup>2</sup> e.g. in the *Orinoco Steamship Co.* case between the United States and Venezuela (Scott's *Hague Court Reports*, p. 226).



Court of Justice, but the Statute of the new Court, which forms part of the Charter, is identical with that of the old, except for a very few and not very important changes. The judges are appointed by the following procedure: Each of the national groups of members of the Permanent Court of Arbitration nominates not more than four persons, who must be qualified in their own country for the highest judicial office or be jurisconsults of recognized capacity in international law, and not more than two of whom may be fellow nationals of their nominators, as candidates for appointment as judges. Apparently the object of this step in the procedure is to reduce the likelihood of political influence by giving the power of nominating candidates to persons who would be independent of their governments, but it is probable that this result has not been achieved, and indeed there is no very strong reason why the nominations should not be governmental. From the list of candidates so made up the Security Council and the General Assembly each separately choose fifteen judges. Any person who is chosen by a majority vote in both bodies is elected, except that, if two persons of the same nationality are chosen, only the elder becomes a member of the Court. There are detailed provisions to meet the event of the Security Council and the General Assembly being unable to agree on the full number of judges; and in the event of a deadlock between the two bodies, in the last resort vacant places are to be filled by the judges already elected. This double election was intended to secure that each

of the Great Powers, who in 1921 formed a majority in the Council of the League, should be assured of a judge on the Court, but as the Great Powers have no majority in the Security Council it no longer serves that purpose; in any case the protection is unnecessary, because there has hitherto been no tendency among smaller Powers to wish to deprive a Great Power of its judge. Five judges are elected every three years; they serve for nine years and are re-eligible; they can be dismissed only if in the unanimous opinion of the other members of the Court they have ceased to fulfil the required conditions. For a sitting of the Court the quorum of judges is nine; but a smaller Court may sit to hear certain classes of cases, such as those in which the parties desire a speedy decision by summary procedure. A judge of the same nationality as one of the parties retains the right to sit, but if a party has no judge of its nationality on the Court, it may nominate one for the particular case. This provision for *ad hoc* 'national' judges can only be defended if it is necessary, as perhaps it is, for political reasons. It is a concession to the vicious theory that in some sense a judge ought to 'represent' the parties, and it places the 'national' judge himself in a difficult position.

The Court is open to all the states which are parties to its Statute, and to others on conditions laid down by the Security Council. Its jurisdiction covers 'all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force', and 'in the event of a dispute as to whether the

Court has jurisdiction, the matter shall be settled by the decision of the Court'. In principle, therefore, the jurisdiction arises only when the parties have agreed to submit a dispute to it; but the Court also possesses a quasi-compulsory jurisdiction in two ways: (i) a large number of treaties have provided in general terms for submission to the Court of disputes arising under them; and (ii) Article 36 of the Statute contains an 'optional clause', whereby members may declare 'that they recognize as compulsory *ipso facto* and without special agreement in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning (a) the interpretation of a treaty, (b) any question of international law, (c) the existence of any fact which, if established, would constitute a breach of an international obligation, (d) the nature or extent of the reparation to be made for the breach of an international obligation'. But neither the treaties nor the clause affects the voluntary basis of the Court's jurisdiction; they merely make it possible for states to accept it in anticipation of their being involved in a dispute.

The 'Optional Clause' has been accepted by a large majority of the members of the Court, but many of these have attached reservations to their acceptances. There are some ambiguities in the wording of the clause itself,<sup>1</sup> and there are many others in the various reservations, so that it may conceivably be

<sup>1</sup> For a discussion of these, see Fischer Williams, *Chapters on Current International Law*, p. 38.

difficult to define the precise obligation which any particular state has undertaken. Article 36, however, goes on to provide that 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'.

The British acceptance of the clause, which was first given in 1929, applies only to 'disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said declaration'. It would be difficult to devise a more indefinite formula; but one thing at least is clear about it, that it most seriously limits the scope of our undertaking. The British declaration then excepts three classes of disputes, those in regard to which the parties agree on some other method of peaceful settlement, those with other members of the British Commonwealth, and those with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom. The first of these is not a very serious limitation; the second is a matter of imperial policy; the third seems to have been added, *ex abundanti cautela*, at the instance of certain of the Dominions, to exclude a class of dispute which the Court would in any case not have had jurisdiction to decide, since it could only say that by international law the question referred to it was exclusively within the jurisdiction of the United Kingdom. Finally, the British acceptance was made subject to a condition that by giving notice we might require proceedings in the Court to be suspended in respect of any dispute which had been submitted to

the Council of the League, such suspension being limited to twelve months, unless the parties agreed, or the Council decided, to extend it. The object of this provision was apparently to provide an opportunity for settlement by conciliation, but the short time-limit made it not very important.

The United States accepted the Optional Clause in 1946, but subject to reservations which go far towards nullifying the effect of the acceptance. It is not to apply to disputes with regard to matters which are essentially within the domestic jurisdiction of the United States, but this is to be determined not, as in the British declaration, by the Court, but by the United States itself; nor to disputes arising under a multilateral treaty unless either all the parties to the treaty *affected by the decision* are parties to the case before the Court, or the United States specially agrees to jurisdiction. The meaning of the words italicized in this latter reservation is very obscure.

The law that the Court is to apply is, as already stated, laid down as follows: (1) international conventions, (2) international custom as evidence of a general practice accepted as law, (3) the general principles of law recognized by civilized nations, (4) judicial decisions and teachings of publicists as subsidiary means for the determination of the law, and (5) if the parties agree, it may decide *ex aequo et bono*.<sup>1</sup>

Besides its contentious jurisdiction over disputes referred to it by states, the Court, under Article 96 of

<sup>1</sup> *Supra*, p. 57.



the Charter, may be requested by the General Assembly or the Security Council 'to give an advisory opinion on any legal question'; other organs of the United Nations and specialized agencies may also request advisory opinions 'on legal questions arising within the scope of their activities', if authorized to do so by the General Assembly. The Court has consistently treated this advisory jurisdiction as a judicial function, and it has assimilated the proceedings in most respects to that used in the contentious jurisdiction. In 1923 the Council of the League, at the instance of Finland, requested an opinion on the obligations of Russia in Eastern Carelia under the Treaty of Dorpat, 1920; the Soviet Government, however, refused to take part in any discussion before the Court, and in these circumstances the Court declined to give an opinion, holding that to do so without the co-operation of both parties would be to depart from the essential rules guiding its activity as a court of justice. In practice the advisory jurisdiction proved unexpectedly important, for the Council of the League, which was a political body, was often glad to avoid the embarrassment of having to make a decision, by referring a legal issue to the Court. It is true that the opinion of the Court when given, being only advisory, was not actually binding on the Council, but it would not have been easy for the Council to reject it, and it never did so.

Other points of interest in the Statute of the Court are, that cases must be heard in public unless the Court decides otherwise or the parties demand a

private hearing; that reasons for the decision are to be stated, and dissenting judgements may be given; that the official languages are French and English, but the Court may authorize other languages; that decisions are only binding between the parties and for the particular case. This last provision merely means that the binding authority which Anglo-American law attaches to precedents does not apply to the decisions of the Court; it does not mean that the decisions may not be quoted as precedents, or that the Court will not strongly incline to follow them, for no court can be indifferent to its own previous decisions.

### § 3. *The Limits of Arbitration and Judicial Settlement*

It has been a common assumption among international lawyers that not all disputes between states are 'justiciable', that is to say, susceptible of decision by the application, in an arbitral or judicial process, of rules of law. This is a mere truism in one sense, because it is obvious that, so long as states are not compelled to submit to legal process, no dispute is 'justiciable' unless the parties have made it so by undertaking an obligation to treat it as such. But the distinction between 'justiciable' and 'non-justiciable' disputes usually implies more than this; it implies the belief that international disputes are of two distinct kinds, one of which, the justiciable or legal, is inherently susceptible of being decided on the basis of

law, while the other, the non-justiciable or political, is not.

International lawyers, at any rate until recently, have generally agreed that this distinction exists, but they have not been agreed on its content. One view commonly held has been that a justiciable dispute is one for which a rule of law applicable to the dispute exists. This implies that for other disputes, the non-justiciable, no applicable rules exist in the law, and accordingly that a court of law called upon to deal with such a dispute would find itself unable to pronounce a decision. It has already been shown<sup>1</sup> that this difficulty is imaginary. It is a corollary of the extreme positivist view of the nature of international law, according to which, since nothing is law except the rules that states have consented to, the number of legal rules is necessarily finite. It overlooks the dynamic element, which the international like every other system of law reveals as soon as it ceases to be a merely academic study and begins to be applied to factual situations by the accepted processes of judicial reasoning.

International law then is never formally or intrinsically incapable of giving a decision, on the basis of law, on the respective rights of the parties to any dispute, and if that is so, we must look for the difference between justiciable and non-justiciable disputes elsewhere than in some assumed specific quality which distinguishes that law from other systems. Probably to-day most writers would regard it as depending

<sup>1</sup> *Supra*, p. 68.

upon the attitude of the parties: if, whatever the subject-matter of the dispute may be, what the parties seek is their legal rights, the dispute is justiciable: if, on the other hand, one of them at least is not content to demand its legal rights, but demands the satisfaction of some interest of its own even though this may require a change in the existing legal situation, the dispute is non-justiciable. It is certain that many disputes, probably most of the serious disputes, of states are of this kind, and this is an important fact in the relations of states, of which, whether we like it or not, we must take account. But it does not supply what the controversy on the subject has assumed to exist, an objective test whereby we may classify disputes into two kinds; it does not enable us to predict, merely from a knowledge of the subject-matter of a dispute, that it will be justiciable or that it will be non-justiciable; it merely reminds us of an already known fact, namely, that states do sometimes regard a decision on the basis of law as a satisfactory method of disposing of their disputes, and that sometimes, for whatever reason, good or bad, they or at least one of the states concerned does not.

No lawyer is likely to doubt the desirability of a much greater readiness on the part of states than they at present show to accept the settlement of their disputes on the basis of law. The present unlimited freedom of states to reject that method of settlement is entirely indefensible; it makes possible the grossest injustices, and it is a standing danger to the peace of the world by encouraging the habit of states to regard

themselves each as a law unto itself. On the other hand, the problem is not a simple one, and it is not likely to meet a quick solution, such as was aimed at in the General Act of Geneva of 1928, by the acceptance of existing law as a universally applicable basis for the settlement of all disputes. A declaration of their legal rights when states are quarrelling about something other than their rights is not in any true sense a 'settlement' of their dispute: it may occasionally facilitate a settlement by subsequent agreement, but it may not improbably have exactly the opposite effect by making a compromise seem unnecessary to the party that is satisfied with the declaration. It is tempting to appeal to the analogy of the individual and his relation to the courts of the state, but this is in many respects misleading. International law at its present stage of development gives a far less effective protection to the reasonable interests of states than does the law of a civilized constitutional state to those of individuals, both because the substance of the law is defective relatively to the interests which it ought to be able to protect, and because the circumstances in which it has to be administered are more difficult. Thus of many anti-social acts which affect the perfectly reasonable interests of another state, international law, if appealed to, could only say that they are matters exclusively within the domestic jurisdiction of the state whose conduct is in question, and therefore that no legal right of the injured state has been violated. A national court, again, is normally supplied with a body of well-established doctrine; its



judges share the traditions and sentiments of those to whom they administer justice; and a regular system of appeals exists to correct their mistakes; but none of these safeguards exists in the international system.

These differences are not likely to be overlooked, but there are also certain limitations on the potentialities of judicial procedure in general which it is well to bear in mind. One is that a dispute does not necessarily receive its quietus because a court of law may have pronounced upon it. There are historical instances in which the decisions of courts have had exactly the reverse effect, and have been contributory causes of the outbreak of war. This is true of Hampden's case in 1637, in which the Court declared the law on the question of ship-money, and of the Dred Scot case in 1857, in which the American Supreme Court declared the law on the question of slavery; each of these cases had its sequel in a civil war which was fought in part to determine afresh the very issues which the courts had decided.

Further, it ought never to be forgotten that law is not merely a convenient device for the settlement of disputes; it is not something that can be made an effective instrument at a crisis and left out of account at other times; it is useful as a means of settlement only when, and so far as, a society has accepted the rule of law as its way of life. It is only because the judicial organs of a state are part of the whole complicated machinery of a state's government that they are able to work with the relatively high degree of

efficiency to which we are accustomed. In fact the example of the state, if it is examined more closely, is discouraging to the view that all disputes ought to or can be settled on the basis of existing law, for international disputes find their nearest analogy not in the disputes of individuals at all, but in a class of disputes which the practice of states itself tends to treat by political rather than judicial methods. By their very nature they are differences between large associated groups; and when such a group of persons within the state is discontented with its existing legal rights, a wise government does not merely refer them to the courts of law; it considers the arguments for and against a change of the law. When states are so minded and so organized that they too can deal with the more difficult disputes in this spirit, not only will peace be more secure than it is at present, but the judicial system itself, within its proper sphere, will be established on a firmer foundation.

Some of these difficulties of devising an all-inclusive scheme for the settlement of disputes would doubtless not apply if arbitrators or judges, instead of being required to give decisions based on existing law, were given a discretion to decide *ex aequo et bono* when the legal situation seems to them to be in conflict with the justice of the case. Proposals for a so-called 'equity tribunal' on these lines have often been made in recent years. It has already been mentioned that the Statute of the International Court provides for a decision of this kind 'if the parties agree'; and though this particular provision has not yet been used, the

method is frequently used with advantage in the settlement of differences of secondary importance. After the proceedings before the Permanent Court in the *Free Zones* case,<sup>1</sup> France and Switzerland, being dissatisfied with the position established by the decision for the commerce between the Free Zones and Switzerland, but unable to agree on the changes to be introduced, empowered an arbitral tribunal to lay down a 'more liberal and legally more stable régime', and the regulations laid down by this tribunal themselves contain a provision that, in default of agreement, an arbitral tribunal, deciding *ex aequo et bono*, might in the future adapt them to new economic conditions.<sup>2</sup> It would, however, be a very different matter to extend this method of settlement by making it compulsory, even in the last resort, for all disputes.

A judge or an arbitrator applying legal principles is an expert, and his opinion that such and such are the rights of the parties has a special value; but an arbitrator's opinion of what is fair and just cannot be based on any objective standard and is worth intrinsically neither more nor less than that of any other equally fair-minded and intelligent person. The dissatisfaction of a state with the *status quo* raises a question which is not a judicial one, and cannot be turned into a judicial question by adopting judicial methods of procedure; it raises a question which is essentially *political*, susceptible of amicable settlement

<sup>1</sup> *Supra*, p. 244.

<sup>2</sup> For references see Habicht, 'Power of the International Judge to give a decision *ex aequo et bono*', pp. 78 and 84.

no doubt, but only by appropriate *political* methods, by negotiation, by compromise, by mediation or conciliation; and when it relates to a matter which the states concerned regard as vital to their interests there is not the smallest chance that it will or can be settled by the *ipse dixit* of an arbitrator.

The true nature of the power which would be entrusted to an 'equity tribunal' should be understood; a power to decide *ex aequo et bono* is a power to abrogate or modify existing legal rights, and essentially that is a power to *legislate*. However urgent it may be to create a procedure for the orderly modification of international legal rights in proper cases, it is inconceivable that the solution will be found in the simple plan of handing over to arbitral tribunals, responsible for their decisions only to their own consciences, a function which states are not yet prepared to concede to an international legislature. Legal rights ought not to be immutable, but a system in which one state could be required, on the mere demand of another, to put in issue its legal rights on any matter about which the two were in controversy would be as unreasonable as it is improbable.

#### § 4. *Good Offices, Mediation, Conciliation*

In these modes of composing a quarrel, the intervention of a third party aims, not at *deciding* the quarrel for the disputing parties, but at inducing them to decide it for themselves. The difference between the two first terms is not important; strictly a state is said to offer 'good offices' when it tries to induce the

parties to negotiate between themselves, and to 'mediate' when it takes a part in the negotiations itself, but clearly the one process merges into the other. Both, moreover, are political processes, which hardly fall within international law. The Hague Conventions for the Pacific Settlement of International Disputes declare it to be desirable that powers strangers to a dispute should offer their good offices and mediation, and such an offer is not to be regarded as an unfriendly act.

The same Conventions also introduced a new device for the promotion of peaceful settlements, in Commissions of Inquiry, whose function was simply to investigate the facts of a dispute and to make a report stating them; this report was not to have the character of an award, and the parties were free to decide what effect, if any, they would give it. The Commission was to be constituted for each occasion by agreement between the parties. This machinery was used with good effect in the Dogger Bank dispute between Great Britain and Russia in 1904.

The idea underlying these Commissions, that if resort to war can only be postponed, and the facts clarified and published, war will probably be averted altogether, inspired the so-called 'Bryan treaties', the first of which was concluded between Great Britain and the United States in 1914. Under these the parties agreed to refer 'all disputes of every nature whatsoever' which cannot be otherwise settled to a standing 'Peace Commission' for investigation and report, and not to go to war until the report was



received, which had to be within a year. The Commission consisted of one national and one non-national chosen by each party, and a fifth, not a national of either party, chosen by agreement. No disputes whatsoever were excluded from the operation of these treaties.

The method of the 'Bryan treaties' was extensively adopted in later developments of international organization, and as it is essentially different from the method of arbitration on the one hand, and not precisely the same as that of mediation on the other, it is convenient to refer to it as 'conciliation'. It has been defined as 'the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and . . . to make a report containing proposals for a settlement, but not having the binding character of an award or judgement'.<sup>1</sup> Conciliation, therefore, differs from arbitration, because in it terms of settlement are merely proposed, and not dictated to the disputing states; it is therefore, unlike arbitration, a method appropriate to any dispute whatsoever. In the period between the two Great Wars machinery of conciliation was set up by many treaties between particular states, notably by those of Locarno in 1925. Each of the so-called 'arbitration conventions' which were concluded at Locarno set up a 'Permanent Conciliation Commission' of five persons, consisting of one national of each of the signatory states and three non-nationals; disputes 'as to the respective rights' of the parties

<sup>1</sup> Oppenheim, *International Law*, 5th ed., vol. ii, p. 12.

might by agreement be referred to the Commission, but if not settled there, they were to be referred to arbitration or to the Permanent Court; other disputes were to be referred to the Commission. Its task was to 'elucidate questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to an agreement . . . at the close of its labours the Commission shall draw up a report'.

But neither these Locarno provisions nor those of other treaties setting up conciliation commissions fulfilled the hopes that were placed in them, and very few of the commissions ever had occasion to meet.

#### § 5. *Settlement under the Covenant and the Charter*

The Covenant of the League contained a comprehensive scheme for the settlement of international disputes which is still of interest, especially for the contrast which it provides with that of the Charter of the United Nations. By Article 12 the members agreed that 'if there should arise between them any dispute likely to lead to a rupture' they would deal with it in one of three ways; they would submit it either to arbitration, or to the Permanent Court, or to inquiry by the Council. In the first alternative the award, and in the second the judicial decision, had to be given within a reasonable time; in the third the Council had to make its report within six months; and the members agreed that they would not 'resort to war' until three months after the award or the decision or the report as the case might be. The

motive of this last provision was doubtless the feeling that if a war can be delayed long enough for excitement to cool and for the issues to be debated in an impartial forum, it will probably be averted altogether, but subsequent events suggest that this was an over-optimistic view.

Article 13 dealt with the first two alternatives provided by Article 12, and indicated the disputes which were considered 'generally suitable' for arbitration or judicial settlement. The disputes enumerated were the same as those in the optional clause of Article 36 of the Statute of the Court of International Justice, which has been quoted above.<sup>1</sup> The members agreed to carry out an award or judgement in good faith, and not to resort to war against a member which complied therewith. In the event of failure to carry out an award or judgement, the Council was to propose what steps should be taken to give effect thereto.

Article 15 dealt with the third alternative of Article 12, the submission of a dispute to the Council. The Council's first task was 'to endeavour to effect a settlement of the dispute', and if it succeeded it was then to publish a statement of the facts and the terms of settlement, the object of this provision being presumably to reduce the chance that the Council, a political body, might be tempted to sacrifice the just claims of a weak power to political expediency. If, however, this attempt to get the parties to agree should fail, the Council's next duty was 'to make and

<sup>1</sup> *Supra*, p. 258.

publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto'. It is important to appreciate the exact effect of this report if we would understand the true nature of the scheme. The Council had no power to *dictate* a settlement to the parties; its function was not an arbitral one. The effect of its report differed according as it was reached unanimously (the votes of the parties to the dispute being excluded) or by a majority vote; if it was unanimous, 'the members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report'; if it was a majority report only, they 'reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice'. In other words, in neither case were the parties actually bound to accept the report, but a party which accepted a unanimous report was guaranteed against attack by the other, whereas a majority report did not carry this guarantee, and the parties were free to go to war, after the interval prescribed by Article 12, if they chose. The latter event was one of the so-called 'gaps in the Covenant', that is to say, one of a few cases in which the Covenant did not absolutely forbid states to resort to war; but the importance of these 'gaps' was often exaggerated. Though it was theoretically possible that an intending aggressor might first scrupulously observe all his obligations under the Covenant and then take advantage of one of the gaps to enter on a war from

which he had not actually promised to refrain, that event was always most improbable, and none of the wars that occurred while the League was existing did in fact begin in that way; all of them either involved breaches of a state's obligations under the Covenant, or would have done so if the aggressor had been a member of the League.

Article 16 contained the 'sanctions' provisions, and the event in which these were to be put into force was simply defined; it was that a member should 'resort to war in disregard of its covenants', namely, those contained in the articles already quoted. There have been interminable discussions about the difficulty of defining 'aggression', but Article 16 did not use the word; it made a definition unnecessary by making the occasion for sanctions depend on the refusal of a prescribed procedure of peaceful settlement. The provisions relating to the form that the sanctions were to take when the occasion arose were not in all respects satisfactorily drafted; some of them were not free from ambiguity, and there was a tendency to rely too much on economic sanctions, the tremendous efficacy of which seemed to have been demonstrated by the war which had just ended, and to leave the possible need for military action somewhat obscure. But the points of principle which are of most interest to-day are (a) that the occasion for sanctions was not left indeterminate or discretionary, but was precisely defined; and (b) that it was left to each of the members to decide for itself whether the occasion had arisen, and consequently whether it was under obligation to



join in the imposition of sanctions. The Council might recommend plans for co-ordinating the actions of the members in that event, but it could not make decisions on their behalf nor issue directions which they would be bound to follow. There was thus, of course, a risk that the several members might not all decide alike, but as sanctions would never be contemplated except in a very clear case, it was practically certain that, if they acted honestly, they would; if they were not ready to honour their obligations, neither the Covenant nor any other system of sanctions could possibly work. In the event, sanctions were resorted to only once in the history of the League, namely against Italy in 1935-6, and then all the members except three small states which were entirely dependent on Italy's goodwill did reach identical decisions, and the fact that the sanctions failed had nothing whatever to do with the absence of a power in the League Council to make a decision on behalf of the League as a body. They failed because the leading powers in the League, for political reasons wholly unconnected with the merits of the case, were not willing to risk a total breach with Italy, and therefore refrained from any action which might seriously have affected her plans for the conquest of Ethiopia. The machinery prescribed by the Covenant for putting sanctions into operation worked on the whole very well.

The provisions of Articles 24 and 25 of the Charter, which have been referred to in an earlier chapter, are these:

'In order to ensure prompt and effective action by the United Nations its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.'

Later articles of the Charter contain certain 'specific powers' which are granted to the Security Council 'for the discharge of these duties', and the members 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

Unlike the Covenant the Charter contains no specific programme for the exercise of the powers of the Security Council, but it makes an important distinction between powers relating to the Security Council's function of promoting pacific settlement and those relating to enforcement action. In fact, in relation to the former, it has in strictness no powers; its decisions are no more than recommendations to the parties. Thus it may call upon the parties to any dispute 'the continuance of which is likely to endanger the maintenance of international peace and security' to settle it by some peaceful method of their own choice. It may 'investigate any dispute, or any situation which might lead to international friction and give rise to a dispute' in order to determine whether its continuance is likely to endanger peace and security, and at any stage of such a dispute or situation it

may 'recommend appropriate procedures or methods of settlement'. If it should decide that the continuance of the dispute is, in fact, likely to endanger peace and security, it may go farther than this and 'recommend such terms of settlement as it may consider appropriate'. But it cannot dictate such terms. It has already been mentioned that 'a party to a dispute' must abstain from voting on decisions relating to its peaceful settlement, and that in estimating the importance of this exception to the veto rule it has always to be remembered that there can be no 'party to a dispute' unless there is a dispute, and that the question whether there is a dispute is not one of procedure but one to which the veto can be applied. The exception, therefore, which is sometimes called the 'Yalta Formula' because it was at the Yalta Conference that the first draft of it was agreed to, is illusory.

When, however, the decisions of the Security Council involve action for the maintenance of peace, they may be more than recommendations; they may be directions which the members of the United Nations are bound to carry out. It must determine 'the existence of any threat to the peace, breach of the peace, or act of aggression', and 'make recommendations or *decide* what measures shall be taken' to maintain or restore the peace, and before making such a recommendation or decision it may call upon the parties, in order to prevent an aggravation of the situation, to comply with any necessary provisional measures without prejudice to their rights or claims,

and it 'shall duly take account of failure to comply with such provisional measures'. But, unlike the Covenant, the Charter contains no test for deciding whether an occasion for sanctions has arisen or not; it leaves it to the discretion of the Security Council to determine what constitutes a threat or a breach or an aggression, and except for its general obligation to act in accordance with the Purposes and Principles of the United Nations, there is nothing to ensure that its determination shall be just. When it has decided that action is called for, the Security Council may direct measures not involving the use of armed force, such as the interruption of economic relations and of means of communication, and the severance of diplomatic relations; and if it considers such measures inadequate 'it may take such action by air, sea, and land forces' as may be necessary to maintain or restore the peace. All the members of the United Nations have bound themselves to make available to it for this purpose 'on its call and in accordance with a special agreement or agreements' armed forces and other forms of assistance and facilities, and these agreements are to specify the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided; and in order to enable 'urgent military measures' to be taken, the members are to 'hold immediately available national air force contingents for combined international enforcement action'. A Military Staff Committee, consisting of the chiefs of staff of the permanent members or their representatives,

is to advise the Security Council on all questions relating to its military requirements, and is responsible under the Security Council for the strategic direction of the armed forces at its disposal. No 'special agreements' have yet been made, and the provision seems likely to be a dead letter.

The Charter allows regional arrangements and agencies for dealing with matters relating to the maintenance of peace, and members who enter into such arrangements are to try to achieve the pacific settlement of local disputes through them before referring the disputes to the Security Council; where appropriate, the Security Council is to utilize such arrangements or agencies for enforcement action. But it is at all times to be kept informed of activities undertaken or contemplated under regional arrangements or by regional agencies, and the only enforcement action for which they may be used without the authorization of the Security Council is the taking of measures against a renewal of aggressive policy on the part of ex-enemy states of the Second World War.

It has already been pointed out that the veto of the Great Powers can be used to prevent any decision on enforcement action being taken, but there is this important mitigation of the paralysing effect that the existence of the veto might otherwise have on the whole scheme, that, until the Security Council has taken measures necessary to maintain the peace, the Charter allows a right of individual or collective self-defence if an armed attack is made against a member of the United Nations. Hence if, as might easily



happen, the veto of a Great Power were to prevent the Security Council from reaching a decision, other powers would be free to take action against the aggressor. Action under the Atlantic Pact would be 'collective self-defence' under this article.

It is, however, clear that the veto makes it impossible for the Security Council ever to use its powers against a Great Power, and if the Covenant had contained a similar provision, Italy in 1935 might have vetoed the taking of sanctions against herself, and would have been free, so far as the Covenant was concerned, to proceed undisturbed with her aggression against Ethiopia. Yet the only event to-day which can seriously endanger the peace of the world is aggression by a Great Power, and a system which solemnly declares, as the Charter does, that its purpose is 'to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression', and yet does not propose to deal with the aggression of a Great Power, is little better than a sham. It may be that no system of collective security can avail against a Great Power, and this seems to be the view taken in the official British commentary on the Charter; no enforcement action, it says, can be taken in such a case without a major war, and if such a situation were to arise the United Nations would have failed in its purpose and the members would have to act as seemed best in the circumstances. All that may be true. But if it is, it is mere hypocrisy that the Charter should declare that the peoples of the United Nations

have 'determined to unite their strength to maintain international peace and security'. What they have actually done is something much less than that, and if there never was any idea that the procedure of the Charter might, if necessary, be used against a Great Power, it is difficult to see the reason for all the elaborate provisions which have just been described. It does not make sense to suppose that all the members are to make armed forces available to the Security Council on its call, that they are to hold air forces immediately available, that the Military Staff Committee is to advise the Security Council on all questions relating to its military requirements, and so on, if the only purpose of all these formidable plans is to deal with a small Power when it misbehaves. Small-power aggression never has been and never can be a serious problem to the peace of the world if the Great Powers are agreed among themselves, and if they are not, then this machinery cannot be used.

It seems probable that the explanation must be sought in the circumstances in which the Charter was originally drafted. It was drafted at Dumbarton Oaks in the autumn of 1944, when the issue of the war was still uncertain, and, to outward appearance at least, Germany and Japan still seemed immensely strong. It sought to forge a weapon which could be used against just such a danger as then existed, a security system of irresistible power and ready for immediate action. But the weapon that was fashioned has turned out to be a highly specialized instrument, useful only if history should ever repeat itself, against

a particular danger for which we no longer need it, and only on the assumption that the war-time unity of the Great Powers would be a permanent factor in their relations. Instead of a system that ensures 'prompt and effective action' we have one that can be jammed by the opposition of a single Great Power. We have discarded the system of the Covenant which, though not certainly, might possibly have worked, and we have substituted for it one which hardly even professes to be workable, and instead of limiting the sovereignty of states we have extended the effective sovereignty of the Great Powers, the only states whose sovereignty is still a formidable reality in the modern world.

## IX

# INTERNATIONAL LAW AND RESORT TO FORCE

### § 1. *Intervention*

THIS word is often used quite generally to denote almost any act of interference by one state in the affairs of another; but in a more special sense it is confined to acts of interference either in the domestic or the foreign affairs of another state which violate that state's independence. A mere tender of advice by one state to another about some matter within the competence of the latter to decide for itself would not be an intervention in this sense, though it might be popularly so described; the interference must take an imperative form; it must either be forcible or backed by the threat of force.

Neither the practice of states in their relations with one another, nor the opinions of writers on international law, afford any clear answer to the question when an intervention in this sense is legitimate. Practice on the matter has been determined more often by political motives than by legal principles. Moreover, the extremest form of intervention is war, and until recently modern international law, as we have seen, has not attempted to distinguish between legal and illegal occasions of making war. As long as this was the attitude of the law to war, it is not surprising that there should have been little agreement

on the principles which regulated the less extreme measures of coercion by which one state might assume to dictate a certain course of action to another. For there was a certain unreality in attempting to formulate a law of intervention and at the same time admitting, as until recently it was necessary to admit, that a state might go to war for any cause or for no cause at all without any breach of law. How easily such a law could be circumvented was shown by Great Britain and Germany in 1901, for when the United States objected to certain measures which they proposed to take against Venezuela under the guise of a 'pacific blockade', they regularized the matter by acknowledging a state of war to exist.<sup>1</sup> An effective law of intervention therefore is intimately related to the wider problem of the effective limitation of the liberty of states to go to war.

Another difficulty of this branch of the law arises from the present predominantly individualist basis of international law. The independence of states clearly obliges us to regard the strictly legal grounds of intervention as exceptions to a general rule of non-intervention. But it will be difficult to limit interventions in practice to those for which a legal justification can be pleaded, until it is also possible for the law to restrain some of the anti-social uses which states at present are free to make of their independence. At present an intervention, which we are forced to stigmatize as illegal, may even deserve moral approval, as did possibly some of the interventions

<sup>1</sup> Cf. Moore, *International Law Digest*, vol. vii, p. 140.



which took place in the affairs of the former Turkish Empire. It is probably the realization of this possible contradiction between law and morality that leads some writers to regard humanitarian reasons as a legal justification for intervention; but it involves a radical departure from the present basis of international law to maintain that a state's treatment of its own subjects is, in the absence of any treaty protection, anything but a domestic matter which it may decide at its own discretion. It seems necessary, therefore, to admit that no intervention, apart from interventions taking place under a treaty giving such a right to the intervening state, can be strictly legal except one which is directed against a state which, either by commission or omission, is guilty of an international wrong. 'Intervention is thus not so much a right, as the sanction of the rights of states. It constitutes for a state a means of assuring the fulfilment by other states of the duties which they owe to it.'<sup>1</sup>

In strict theory the legality of an intervention by many states acting together must be judged by the same tests as that of an intervention by a single state, but politically and even morally the distinction may be vital. On many occasions in the nineteenth century the Great Powers intervened, by action which technically and legally involved a usurpation of power, in order to impose the settlement of a question which threatened the peace of Europe;<sup>2</sup> and the

<sup>1</sup> Fauchille, *Droit international*, vol. i, p. 562.

<sup>2</sup> Cf. *supra*, p. 88.

Covenant of the League, which was drafted at a time when it was assumed that all the Great Powers would be members, in certain of its articles claimed for the League a right similar to that formerly arrogated by the Powers. In the absence of effective legislative procedure for altering international conditions, such extra-legal action by states which are in a position to take it effectively may sometimes be the only practicable alternative to war, and the provisions of the Covenant were at least an advance upon the earlier practice. But in so far as they contemplated action against non-member states they were from a legal point of view, as Professor Redslob has described them, at most 'un principe d'avenir qui porte en lui une force conquérante. L'article 17 devance le droit actuel.'<sup>1</sup> The Charter makes a similar claim for the United Nations; the Organization is to 'ensure that States which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security'. But there is also an important limitation on the right of the United Nations to intervene, for 'nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures.'

The strictly legal occasions of an intervention may

<sup>1</sup> *Théorie de la Société des Nations*, p. 116.

conveniently be brought under three heads, self-defence, reprisals, and the exercise of a treaty right. The two former require detailed consideration, but it will suffice to give one illustration of the last. By the Treaty of Havana, of 1903, Cuba agreed that the United States might intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and in certain other events. This right was exercised on more than one occasion by the United States, but in 1934 it was abrogated by a new treaty.)

(The feeling that existing international law does not always adequately protect what states regard as their own reasonable interests gives some measure of moral justification to the maintenance by some of the more powerful among them of policies in which they deliberately avow their intention to intervene in the affairs of other states in certain events which they regard as threatening their national security or interests. The Monroe doctrine of the United States is an example of such a policy. President Monroe's famous message to Congress in 1823 laid down two important principles of American policy: (1) that the American Continents were henceforth not to be considered as subjects for future colonization by European powers, and (2) that the United States would not take part in the wars or affairs of Europe, and would regard the interposition of a European state in the affairs of any American state as an unfriendly act. As a matter of history the first of these principles was

directed at possible encroachments by Russia in the north-west, and the second was a warning to the Holy Alliance, which was then meditating action to restore the authority of Spain in South America.

The original doctrine of Monroe has been extended from time to time by the deduction from it, or the addition to it, of various so-called 'corollaries'. President Polk in 1848 interpreted it as forbidding the transfer, even voluntarily, of American territory to a non-American state. President Cleveland in 1895 claimed under it a right for the United States to determine the true boundary line between British Guiana and Venezuela, and threatened to resist as an aggression against American rights the appropriation by Britain of any territory which 'we have determined of right belongs to Venezuela'. On the same occasion the Secretary of State, Mr. Olney, went so far as to declare that the United States was 'practically sovereign', and 'her fiat law' on the American Continent. President Theodore Roosevelt in 1904 asserted that the doctrine entitled the United States to exercise 'an international police power', and for a time it seemed likely that a doctrine which began as a claim to veto European intervention in Latin-American countries would be converted into a claim by the United States of an exclusive right to intervene in them herself. At times the development of something like an 'economic Monroe doctrine' has seemed probable and the United States has shown a tendency to resent the acquisition even of economic influence in states on the American Continent by any

but her own nationals. Recent Administrations in the United States, however, have shown themselves desirous of removing the more extravagant of the corollaries which the doctrine has been supposed to involve for American foreign policy.

The Monroe doctrine is a policy which the United States has followed in her own interest more or less consistently for more than a century, and in itself is not contrary to international law, though possible applications of it might easily be so. But it certainly is not a *rule* of international law. It is comparable to policies such as the 'balance of power' in Europe, or the British policies of maintaining the independence of Belgium or the security of our sea-routes to the East, or the former Japanese claim to something like a paramount influence over developments in the Far East. Apart from other objections, it is impossible to regard as a rule of law a doctrine which the United States claims the sole right to interpret, which she interprets in different senses at different times, and which she applies only as and when she chooses. Nor is the doctrine, as Article 21<sup>1</sup> of the Covenant described it, a 'regional understanding', for the other states of the 'region' concerned, that is to say, the Continent of America, have never been parties to it and indeed have often resented it.

<sup>1</sup> 'Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.'



§ 2. *Self-defence*

A state, like an individual, may protect itself against an attack, actual or threatened. This right is expressly affirmed in the Charter of the United Nations, article 51 of which provides that 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security'. The principle of self-defence is clear, though its application to specific facts may often be a matter of difficulty. But a particularly clear example of an intervention justified on this ground is afforded by the incident of the steamer *Caroline* in 1837. During an insurrection in Canada the *Caroline* was used to transport men and materials for the rebels from American territory into Canada across the Niagara river. The American Government had shown itself unable or unwilling to prevent this traffic, and in these circumstances a body of Canadian militia crossed the Niagara, and, after a scuffle in which some American citizens were killed, sent the *Caroline* adrift over the Falls. In the controversy that followed, the United States did not deny that circumstances were conceivable which would justify this action, and Great Britain for her part admitted the necessity of showing circumstances of extreme urgency. They differed only on the question whether the facts brought the case within the exceptional

principle. A recent American writer has summed up the incident by saying that 'the British force did that which the United States itself would have done, had it possessed the means and disposition to perform its duty'.<sup>1</sup>

The formulation of the principle of self-defence in this case by the American Secretary of State, Daniel Webster, has met with general acceptance.<sup>2</sup> There must be shown, he said, 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation'; and, further, the action taken must involve 'nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it'.

The second of these propositions is as important as the first and more likely to be overlooked, for there is a natural temptation, when force has been resorted to, to continue its use after the needs of defence have been fairly met. Thus whatever may have been the true view of the initial use of force by the Japanese in Manchuria in 1931,<sup>3</sup> it was impossible to regard their later operations as measures of defence.

But many writers on international law are not content to admit the existence of a right of self-defence

<sup>1</sup> Hyde, *International Law*, vol. i, p. 107.

<sup>2</sup> See, however, Westlake's criticism of the words 'leaving no moment for deliberation', in *International Law*, Part I, p. 300.

<sup>3</sup> On this the verdict of the Lytton Commission was that the operations were *not* measures of legitimate self-defence, but that the officers on the spot may conceivably have thought that they were. See the Report of the Commission, p. 71.

in this strictly limited sense. They assert the existence of a much wider right, that of self-preservation. In writers who accept the doctrine of the 'fundamental rights' of states, this alleged right generally takes precedence of all others; and even a writer generally so moderate in his views as the late W. E. Hall described it in these extravagant terms: 'Even with individuals living in well-ordered communities the right of self-preservation is absolute in the last resort. *A fortiori* it is so with states, which have in all cases to protect themselves.'<sup>1</sup> 'In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation.'<sup>2</sup> Such statements would destroy the imperative character of any system of law of which they were true, for they make all obligation to observe the law merely conditional; and there is hardly any act of international lawlessness which, taken literally, they would not excuse. If, for example, on 2 August 1914, it was Germany's right to consider only her own preservation, as under this doctrine it was, then she had a legal justification for her attack on Belgian neutrality, and it is irrelevant to inquire whether Belgium was in any way responsible for the danger in which Germany found herself. Fortunately, we are not bound to admit that international law has admitted so immoral a principle as these unguarded statements would imply, and the supposed analogy with national law, on which they generally seem to be based, is quite unsound.

Lord Bacon once imagined the case of two men who

<sup>1</sup> *International Law*, 8th ed., p. 65.

<sup>2</sup> *Ibid.*, p. 322.

seized the same plank in a shipwreck, and because the plank could not bear the weight of both, one pushed the other off and he was drowned. There is no doubt that in English law that action would be murder. Indeed, when two men and a boy were cast away at sea in an open boat, and the men, after their food and water had been exhausted for many days, killed and ate the boy, they were actually convicted of murder, although the jury found that in all probability all three would have died unless one had been killed for the others to eat.<sup>1</sup> An American case is to the same effect.<sup>2</sup> The ship *William Brown* struck an iceberg, and some of the crew and passengers took to the boats. The boat was leaking and overloaded, and, in order to lighten it, the prisoner helped to throw some of the passengers overboard. He was convicted of murder. In both these cases a right of self-preservation, if any such right were known to the law, would have justified the acts committed, but it is equally clear that in neither were the acts truly defensive, for they were directed against persons from whom danger was not even apprehended. National law, indeed, is so far from recognizing an absolute right in the individual to preserve himself at all costs, that it sometimes even places on him, without any fault of his own, a legal duty to sacrifice his own life; compulsory military service is an obvious case in point.

The truth is that self-preservation is not a legal.

<sup>1</sup> *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273.

<sup>2</sup> *U.S. v. Holmes*, 1 Wallace Junior, 1.

right but an instinct, and no doubt when this instinct comes into conflict with legal duty either in a state or an individual, it often happens that the instinct prevails over the duty. It may sometimes even be morally right that it should do so. But we ought not to argue that because states or individuals are likely to behave in a certain way in certain circumstances, therefore they have a right to behave in that way. Strong temptation may affect our judgement of the moral blame which attaches to a breach of the law, but no self-respecting system can admit that it makes breaches of the law legal; and the credit of international law has more to gain by the candid admission of breaches when they occur, than by attempting to throw a cloak of legality over them.

Self-defence, properly understood, is a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question. It is not a question on which a state is entitled, in any special sense, to be a judge in its own cause. In one sense a state in international law may always be a judge in its own cause, for, in the absence of a treaty obligation, it is not compulsory for a state to submit its conduct to the judgement of any international tribunal. But this is a loose way of speaking. A state which refuses to submit its case does not become a 'judge'; it merely blocks the channels of due process of law, as, owing to the defective organization of international justice, it is still able to do. This is a defect of general application in international law, which applies, but not in any special sense, to



a disputed case of self-defence. There is, however, another circumstance which gives a certain plausibility to the common claim that every state is competent to decide for itself whether a necessity for self-defence has arisen. It is, or may be, of the nature of the emergency which seems to justify defensive action that action, if it is to be effective, must be immediate. This is equally true of defensive action by an individual. To wait for authority to act from any outside body may mean disaster, either for a state or an individual, and either may have to decide *in the first instance* whether or in what measure the occasion calls for defensive action. With the individual, under any civilized system of law, this initial decision is not final; it may be reviewed later by the law in the light of all the relevant circumstances. There is no reason to believe that the case is different with a state, apart from the procedural difficulty of procuring the submission of the question to judicial review; and fortunately this conclusion does not depend on *a priori* argument. For the practice of states decisively rejects the view that a state need only declare its own action to be defensive for that action to become defensive as a matter of law. Japan, for example, claimed that her action in Manchuria in 1931 was defensive, but neither Japan herself nor other states regarded this claim as concluding the matter in law. On the contrary, the Assembly of the League, Japan alone dissenting, after a discussion which on any other view would have been meaningless and irrelevant, came to the opposite conclusion, and it is clear that

the defensive or non-defensive character of any state's action is universally regarded as a question capable of determination by an objective examination of the relevant facts.

### § 3. *Reprisals*

'Reprisals' is a word with a long history, and modern writers are not agreed on the meaning which should be given to it to-day. Literally and historically it denotes the seizing of property or persons by way of retaliation, and formerly it was not uncommon for a state to issue 'letters of marque' to one of its own subjects, who had met with a denial of justice in another state, authorizing him to redress the wrong for himself by forcible action, such as the seizure of the property of subjects of the delinquent state. The practice was called 'special' reprisals, but it has long been obsolete. Reprisals when they are taken to-day are taken by a state, but some writers would still limit the word to acts of taking or withholding the property of a foreign state or its nationals, for example by an embargo, whilst others would abandon the historical associations and use it to denote any kind of coercive action not amounting to war whereby a state attempts to secure satisfaction from another for some wrong which the latter has committed against it. Whether or not we use the word 'reprisals' in this wider sense, the point of chief interest is to examine the limits which the law sets to the forms of self-help to which states may resort in order to redress a wrong, for so long as the system does not provide an internationally

organized machinery for coercing a delinquent state, it is clear that self-help cannot be altogether eliminated.

Measures which have been commonly used in the past include an embargo on the ships of the offending state which are found in the waters of the other, seizure of a port, or of ships at sea, or of the property of nationals, and pacific blockade. The last-mentioned mode of pressure was frequently used by naval powers during the nineteenth century, and it so happens that frequently the victim has been Greece, which is specially sensitive to this form of pressure for geographical and economic reasons. The question of chief legal interest about it was the doubt whether a blockade of this kind could be legally enforced against the ships of third states, that is to say, of states other than the blockading and blockaded states. In war, belligerents and neutrals have reciprocal rights and duties; but if a blockading state does not choose to regard itself as a belligerent, it is difficult to see what right it has to impose on other states or their subjects obligations which only attach to neutrals in a war. That it has no such right is now generally accepted. Practice on the matter, however, has varied; and many blockades, purporting to be pacific and not hostile, have been enforced against the ships of third states. M. Fauchille justly says of pacific blockade that at bottom it is nothing but an act of war; in resorting to it the strong maritime powers do not seek to avoid war *in se*, but only the inconveniences and the duties that war entails.<sup>1</sup>

<sup>1</sup> *Traité de droit international public*, vol. i, part iii, p. 710.

The conditions of a legal resort to reprisals were discussed in an arbitral award<sup>1</sup> in 1928, and certain principles, which had previously depended for their authority on the arguments of text-writers, were accepted and applied by the tribunal. In 1915, while Portugal was still neutral in the First Great War, an incident took place at Naulilaa, a Portuguese post on the frontier of Angola and the then German South-West Africa, in which three Germans were killed. The Court was satisfied on the evidence that the incident arose out of a pure misunderstanding. The Germans, however, as a measure of reprisals, sent an expedition into Portuguese territory, attacked several frontier posts, and drove out the garrison from Naulilaa. In the regions which the Portuguese were thus compelled to evacuate a native rising took place, and its suppression necessitated a considerable expedition by the Portuguese. The arbitrators laid down three conditions of the legitimacy of reprisals: (a) there must have been an illegal act on the part of the other state; (b) they must be preceded by a request for redress of the wrong, for the necessity of resorting to force cannot be established if the possibility of obtaining redress by other means is not even explored; and (c) the measures adopted must not be excessive, in the sense of being out of all proportion to the provocation received. In this case Portugal had committed no illegal act; Germany had made no request

<sup>1</sup> *Portugal v. Germany* (The Naulilaa case), *Annual Digest*, 1927-8, case no. 360. The full text is printed in *Revue de droit international*, 1929, p. 255.

for redress; and the disproportion between the German action and its provocation was evident. The award was therefore given in favour of Portugal.

The legitimacy of reprisals has been further and drastically limited by conventional law. One such limitation, no longer of great importance in view of the more far-reaching provisions of the Pact of Paris and the Charter, was the so-called *Drago doctrine*. In 1902, when Great Britain and Germany were conducting a pacific blockade of Venezuela in the interests of her British and German creditors, M. Drago, then foreign minister of the Argentine Republic, put forward the contention that the failure of a state to pay its debts does not justify the use of force against it. There may have been good reasons even at that date from a domestic point of view against employing the British fleet as a debt-collecting agency on behalf of British subjects who had made risky investments abroad, but there was then little authority in international law for M. Drago's contention. It led, however, in 1907 to a Hague Convention (No. II) 'respecting the limitation of the employment of force for the recovery of contract debts', whereby the signatory states agreed not to use force for that purpose unless, in effect, the debtor state had refused to submit to arbitration, or having agreed to do so, had failed to obey the award.

To-day, however, at least since 1928, the date of the Pact of Paris or General Treaty for the Renunciation of War, it is clear that reprisals which involve the use of force are no longer legal. By Article 2 the



'High Contracting Powers' agreed 'that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise between them, shall never be sought except by pacific means'. This prohibition is reaffirmed in the Charter of the United Nations which declares that

'All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

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